(26,765)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 679.

JOHN W. SIMPSON AND THOMAS THACHER, AS EXECUTORS OF THE ESTATE OF JOHN G. MOORE, DECEASED, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 10, 1919.

1 Court of Claims.

No. 30176.

JOHN W. SIMPSON and THOMAS THACHER, as Executors of the Estate of John G. Moore, Decd.,

vs.

THE UNITED STATES.

I. *History of Proceedings.*

On June 2, 1908 the claimants filed their original petition.

On February 3, 1910 the defendants filed a demurrer to said petition.

On February 8, 1910, by leave of court, the claimants filed an amended petition.

On February 23, 1910, by leave of court, the defendants withdrew the demurrer to the original petition and filed a demurrer to the original petition and to the amended petition.

On March 19, 1917, by leave of court, the claimants filed a second amended petition, which is as follows:

2 II. *Second Amended Petition and Exhibit "A."*

Filed March 19, 1917.

Second Amended Petition.

To the Honorable the Chief Justice and the Judges of the Court of Claims:

The claimants, John W. Simpson and Thomas Thacher, as executors of the estate of John G. Moore, present their claim against the United States, and respectfully represent to the Court:

I.

On June 13, 1898, the President of the United States approved an act entitled "An act to provide ways and means to meet war expenditures and for other purposes" (30 Stat., 448, 464-5), by section 29 of which legacies and distributive shares arising from personal property became subject to a tax.

Said section 29 was, in full, as follows:

Sec. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies of distributive
3 shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of

ten thousand dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy five cents for each and every hundred dollars of the clear value of such interest in such property.

Second. Where the person or persons entitled to any beneficial interest in such property shall be the descendant of a brother or sister of the person who died possessed, as aforesaid, at the rate of one dollar and fifty cents for each and every hundred dollars of the clear value of such interest.

Third. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the father or mother, or a descendant of a brother or sister of the father or mother, of the person who died possessed as aforesaid, at the rate of three dollars for each and every hundred dollars of the clear value of such interest.

Fourth. Where the person or persons entitled to any beneficial interest in such property shall be the brother or sister of the grandfather or grandmother, or a descendant of the brother or sister of the grandfather or grandmother, of the person who died possessed as aforesaid, at the rate of four dollars for each and every hundred dollars of the clear value of such interest.

Fifth. Where the person or persons entitled to any bene-
4 ficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: Provided, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed, as aforesaid, shall be exempt from tax or duty.

Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hundred thousand dollars, but shall not exceed the

sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three.

II.

Section 31 (30 Stat., 448, 466) of said Act of June 13, 1898, entitled as aforesaid, was, in full, as follows:

"Section 31. That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed are hereby made applicable to this Act."

III.

On April 12, 1902, the President of the United States approved an act entitled "An act to repeal war revenue taxation, and for other purposes" (32 Stat., 96), by which said section 29 of the said act of June 13, 1898, was repealed, said repeal to take effect on July 1, 1902. The portions of said act of April 12, 1902, material to this case are as follows:

"Section. 7. That section * * * twenty-nine of the Act of June thirteenth, eighteen hundred and ninety-eight, and all amendments * * * be, and the same are hereby, repealed.

"Section 8. That all taxes or duties imposed by section twenty-nine of the Act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, prior to the taking effect of this Act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty of said Act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force as follows: * * *

* * * * * * *

"Section 11. That this Act, except as otherwise specially provided for in the preceding section, shall take effect July first, nineteen hundred and two."

IV.

On June 27, 1902, the President of the United States approved an act entitled "An act to provide for refunding taxes paid upon legacies and bequests for uses of a religious, charitable, or educational character, for the encouragement of art, and so forth, under the Act of June thirteenth, eighteen hundred and ninety-eight, and for other purposes" (32 Stat., 406), of which Section 3 is material in this case and reads as follows:

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to provide ways and means to meet war expendi-

tures, and for other purposes,' and amendments thereof, the
6 Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act, approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

V.

On July 27, 1912, the President of the United States approved an act entitled "An act extending the time for the repayment of certain war-revenue taxes erroneously collected" (37 Stat., 240), which reads as follows:

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act may be presented to the commissioner of internal revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

"Sec. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the act aforesaid."

7 VI.

John G. Moore, late of the County and State of New York, and a resident of the Third Internal Revenue District of New York, died June 23, 1899. On June 30, 1899, the last will and testament of said decedent, and the codicil thereto, were admitted to probate in the Surrogates' Court of New York County, and letters testamentary were issued to the claimants, then residents of said County of New York, as the executors of said estate. A copy of said will and codicil is hereto annexed, marked "Exhibit A," and made a part hereof. The claimants continue to be the duly qualified and acting executors of said estate.

VII.

The testator, by his said will and codicil, among other bequests, described therein, gave the following requests which are material to the present case:

(1) To each of his daughters, Ruth Moore and Faith Moore, he gave $100,000 (clause seventh), also certain tangible personal property of the value of $6,866.67 (clauses tenth and twelfth). He also directed, by clause fourteenth, that after the payment of all the other legacies by him given, his executors should convert into money the residue of his estate, except such part as should then consist of stocks and bonds which his executors should deem suitable for the permanent investment of his residuary estate, and should divide said residue into three equal parts, and should assign the same to a Trust Company, to be by his executors appointed, to hold in trust, and to pay the income from one share to his widow for her life, and from a second share to his daughter Ruth for her life, and from a third share to his daughter Faith for her life, with further provis-
8 ions as to the disposition of such shares upon the termination of such life interest, all as more particularly described in said clause.

(2) To Ella L. Moore, his sister, he gave the sum of $10,000 (clause second). He also, by the thirteenth clause of his will, directed his executors to create four funds to be held by them in trust, and to pay therefrom respectively $6,000 per annum to his said sister, $1,000 per annum to Mrs. Sarah H. Aldrich, $1,200 per annum to Wilson Godfrey, his uncle, and $1,200, per annum to Louisa Godfrey, during their respective lives, as more particularly described in said clause.

(3) By clause ninth of his will, as amended by clause first of his codicil, he gave to his brother Harry B. Moore two sums of $20,000 each in trust for his daughters, Katherine and Constance Moore, the testator's nieces, to apply in any way he should see fit for the benefit of each of said nieces respectively the income of one of said sums or such part thereof as he should see fit, accumulating the remainder during her minority, and to pay over the principal, with the accumulations of income, to each of said nieces respectively on her attaining the age of twenty-one years, as more particularly described in said clauses.

VIII.

Subsequent to the testator's death his daughter, Ruth Moore, married Arthur H. Lee, and is still living and without issue. Faith Moore is still living, unmarried. The testator's widow and Ella L. Moore and Louisa Godfrey are also still living. Wilson Godfrey died October 2, 1907. At the death of the testator, Katherine Moore was six years of age, and Constance Moore was three years of age. Katherine Moore and Constance Moore are still living.

IX.

On or about April 1, 1901, the Commissioner of Internal Revenue assessed a tax upon legacies against said executors in the sum of $27,753.85, as follows:

Name.	Age.	Relationship.	Legacy.	Amount taxable.	Rate.	Tax.
Ruth Moore Lee	25	Daughter	100,000.00	.....	.....	.....
"			6,000.00	.....	.....	.....
"			866.67	.....	.....	.....
Life Int in 785,000.24			559,006.21	665,872.88	1.875	12,485.11
Faith Moore	21	"	100,000.00	.....	.....	.....
"			6,000.00	.....	.....	.....
"			866.67	.....	.....	.....
Life Int. in 785,000.24			575,540.83	682,407.50	1.875	12,795.15
Ella L. Moore	49	Sister	10,000.00	.....	.....	.....
Annuity of 6,000			76,542.96	86,542.96	1.125	973.61
Katherine Moore		Niece	20,000.00	20,000.00	1.50	300.00
Constance Moore		"	20,000.00	20,000.00	1.50	300.00
Wilson Godfrey	62	Uncle	10,536.62	10,536.62	3.00	316.10
Annuity of 1,200.						
Louisa Godfrey	59	None	11,677.57	11,677.57	5.00	583.88
Annuity of 1,200.						
						$27,753.85

X.

Thereupon Ferdinand Eidman, Collector of Internal Revenue of said Third District, proceeded to demand and collect and did collect from the claimants as executors aforesaid the full sum of said tax, to wit, $27,753.85, which said sum the claimants as executors paid to said collector on April 12, 1901, and which said sums said collector in due course remitted to the United States.

XI.

The Commissioner of Internal Revenue, in making the assessment of taxes hereinbefore set out, claimed to be acting by authority of Section 3182 of the Revised Statutes of the United States, which provides, in part, and as far as material, as follows:

"The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this Title, or accruing under any former internal-revenue act, where such taxes have not been duly paid by stamp at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties so certified. * * * And all provisions of law of the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, so far as may be necessary, to the proceedings herein authorized and directed."

XII.

The Commissioner of Internal Revenue, in making the said assessment, further claimed to be acting pursuant to a certain pretended rule of regulation by him issued, promulgated and proclaimed on or about December 16, 1898, designated and known as "Series 7, No. 3—Revised Supplement No. 1," to be found printed in the official publication entitled, "Compilations of Decisions rendered by the Commissioner of Internal Revenue under the War Revenue Act of June 13, 1898," (at pages 195 to 199, thereof) printed in 1899 at the Government Printing Office, which said pretended rule or regulation, is as follows, to wit:

"Treasury Department,

"Office of Commissioner of Internal Revenue.

"Washington, D. C.,

"December 16, 1898.

"The appended tables, showing the present worth of an annuity, life interest, and of a reversionary interest, with explanatory notes and examples, are hereby published and promulgated for the use of

internal-revenue officers and administrators, executors, or trustees in determining the duty or tax to be paid to the United States upon legacies or distributive shares arising from personal property,
11 imposed by the act of June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes.'

"N. B. SCOTT,
"Commissioner.

"Approved:
"O. L. SPAULDING,
"Acting Secretary of the Treasury.

"Legacy Taxes.

"Table, Single Life, 4 per Cent., Showing the Present Worth of an Annuity or Life Interest, and of a Reversionary Interest, with Explanatory Notes and Examples.

"(United States Internal-revenue Adjustment, 1898.)

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
10	38.891	$19.45359	$0.21332
11	38.507	19.36943	.21656
12	38.113	19.28184	.21993
13	37.710	19.19065	.22344
14	37.298	19.09590	.22708
15	36.877	18.99764	.23086
16	36.447	18.89569	.23478
17	36.010	18.79010	.23884
18	35.565	18.68070	.24305
19	35.113	18.56751	.24740
20	34.652	18.45038	.25191
21	34.186	18.32932	.25656
22	33.711	18.20416	.26138
23	33.230	18.07471	.26636
24	32.742	17.94097	.27150
25	32.248	17.80274	.27682
26	31.747	17.65984	.28231
27	31.239	17.51224	.28799
28	30.725	17.35968	.29286
29	30.205	17.20225	.29991
30	29.678	17.03961	.30617
31	29.147	16.87176	.31262

12 "Legacy Taxes.

"*Table, Single Life, 4 per Cent., Showing the Present Worth of an Annuity or Life Interest, and of a Reversionary Interest, with Explanatory Notes and Examples.*

"(United States Internal-revenue Adjustment, 1898.—*Continued.*)

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
32	28.608	$16.69846	$0.31929
33	28.067	16.51964	.32617
34	27.516	16.33503	.33327
35	26.961	16.14437	.34060
36	26.401	15.94755	.34817
37	25.834	15.74427	.35599
38	25.263	15.53421	.36407
39	24.685	15.31722	.37241
40	24.101	15.09295	.38104
41	23.511	14.86102	.38996
42	22.915	14.62122	.39918
43	22.313	14.37356	.40871
44	21.708	14.11860	.41852
45	21.103	13.85713	.42857
46	20.499	13.58958	.43886
47	19.896	13.21698	.44935
48	19.298	13.03942	.46002
49	18.703	12.75716	.47088
50	18.113	12.47032	.48191
51	17.527	12.17919	.49311
52	16.947	11.88408	.50446
53	16.372	11.58531	.51595
54	15.804	11.28325	.52757
55	15.243	10.99789	.53931
56	14.689	10.66982	.55116
57	14.143	10.35931	.56310
58	13.603	10.04630	.57514
59	13.072	9.73131	.58726
60	12.549	9.41474	.59943

13 "Legacy Taxes.

"Table, Single Life, 4 per Cent., Showing the Present Worth of an Annuity or Life Interest, and of a Reversionary Interest, with Explanatory Notes and Examples.

"(United States Internal-revenue Adjustment, 1898.—*Continued.*)

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
61	12.029	$9.09765	$0.61163
62	11.532	8.78052	.62382
63	11.039	8.46412	.63600
64	10.557	8.14888	.64812
65	10.088	7.83552	.66017
66	9.630	7.52476	.67212
67	9.185	7.21699	.68396
68	8.753	6.91298	.69565
69	8.333	6.61301	.70719
70	7.926	6.31716	.71857
71	7.532	6.02612	.72976
72	7.151	5.74003	.74077
73	6.782	5.45928	.75157
74	6.425	5.18402	.76215
75	6.081	4.91463	.77251
76	5.749	4.65125	.78264
77	5.428	4.39383	.79254
78	5.119	4.14286	.80220
79	4.823	3.89858	.81159
80	4.537	3.66071	.82074
81	4.262	3.42900	.82965
82	3.995	3.20258	.83836
83	3.737	2.98024	.84691
84	3.484	2.76106	.85534
85	3.236	2.54366	.86371
86	2.992	2.32795	.87200
87	2.752	2.11384	.88024
88	2.517	1.90115	.88842
89	2.286	1.69107	.89650
90	2.062	1.48540	.90441

14 "Legacy Taxes.

"*Table, Single Life, 4 per Cent., Showing the Present Worth of an Annuity or Life Interest, and of a Reversionary Interest, with Explanatory Notes and Examples.*

"(United States Internal-revenue Adjustment, 1898.—*Continued.*)

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
91.....	1.845	$1.28432	$0.91214
92.....	1.637	1.09024	.91961
93.....	1.442	.90647	.92667
94.....	1.263	.73687	.93320
95.....	1.103	.58435	.93906
96.....	.975	.46182	.94378
97.....	.877	.36698	.94742
98.....	.746	.24038	.95229
99.....	.500	.00000	.96154

"Example 1. A person dying bequeaths to his nephew, aged 40 years, an annuity of one thousand dollars during life. What is the present value of the annuity?

"Reference to the foregoing table shows that the present value of one dollar a year, payable at the end of each year during the life of a person aged 40 years, is fifteen dollars nine cents two mills and ninety-five one-hundredths of a mill ($15.09295); therefore the present value of one thousand dollars is one thousand times as much, or fifteen thousand and ninety two dollars and ninety-five cents, the amount upon which tax accrues.

"Example 2. A person dying bequeaths to his daughter, aged 35 years, a life interest in personal property amounting to fifty thousand dollars ($50,000), the estate to revert absolutely at her death to other parties. Required the present value, at the date of death of the testator, of the life interest of the daughter in the estate; also, required, at the same date, the present value of the reversionary interest of said other parties in the estate.

15 "At a net interest of 4 per cent per annum, the assumed rate, the estate of $50,000 will realize an income or annuity of $2,000 per annum. The present value of the sum of $1, payable at the end of each year during the life of a person aged 35 years, is found by the table to be $16.14437, and the present value of an annuity of $2,000 for the same time would be two thousand times as much, or $32,288.74, the amount upon which tax accrues.

"The reversion or present value of $1, due at the end of the year of death of a person aged 35 years, is found by the table to be $0.34060, and such value $50,000 would be fifty thousand times as much, or $17,030, the amount upon which tax accrues.

"NOTE.—This table is based on the 'Actuaries' or Combined Experience Table,' money being worth 4 per cent per annum.

"The first column shows the age of the person under consideration.

"The second column shows the corresponding 'mean redemption period,' and represents the time in years in which the present values of annuities and reversions certain will become equal respectively to the present value of annuities and reversions contingent on the duration of life.

"The 'mean redemption period' is a mean between the last payment of the annuity and the payment of the reversion, averaging six months later than the former payment and six months earlier than the latter payment.

"The third column shows the present value of an annuity for life of one dollar per annum, the last payment being made at the end of the year prior to the one in which death occurs.

"The fourth column shows the present worth of one dollar payable at the end of the year in which death occurs.

"NOTE.—This adjustment has been prepared under the direction of Mr. J. S. McCoy, Government actuary.

16 *"Present Value of Annuities and Reversions Certain upon a 4 per Cent. Basis.*

Number of years.	Present worth of an annuity of one dollar, payable at the end of each year, for a certain number of years. Annuity.	Present worth of one dollar, payable at the end of a certain number of years. Reversion.
1	$0.96154	$0.961538
2	1.88609	.924556
3	2.77509	.888996
4	3.62989	.854804
5	4.45182	.821927
6	5.24214	.790314
7	6.00205	.759918
8	6.73274	.730690
9	7.43533	.702587
10	8.11089	.675564
11	8.76047	.649581
12	9.38507	.624597
13	9.98565	.600574
14	10.56312	.577475
15	11.11839	.555265
16	11.65229	.533908
17	12.16567	.513373
18	12.65929	.493628
19	13.13394	.474642
20	13.59032	.456387
21	14.02916	.438834
22	14.45111	.421955
23	14.85684	.404726
24	15.24696	.390121
25	15.62208	.375117
26	15.98277	.360689
27	16.32958	.346816
28	16.66306	.333477
29	16.98371	.320651
30	17.29203	.308319

17 "Example.—A man dies leaving personal property to the amount of $50,000, his daughter to have the income from it for twenty years, it then to revert to his youngest son. What is the present worth of these legacies?

"The income from $50,000 would be $2,000 per annum, assuming money at 4 per cent.

"The present worth of an annuity of $2,000 for twenty years will be 2,000 times an annuity of $1 for twenty years. In the table, opposite 20, we find the value of an annuity of $1 to be $13.59032;

therefore the present worth of an annuity of $2,000 will be $27,-180.64.

"A reversion of $1 at the end of twenty years is shown by the table to be $0.456387, and a reversion of $50,000 will be 50,000 times as much, or $22,819.35."

XIII.

The value of the life interests of the daughters, Ruth Moore Lee and Faith Moore, and of the annuities of Ella L. Moore, Wilson Godfrey and Louisa Godfrey, was ascertained and assessed by the Commissioner of Internal Revenue by the use of the said tables, as more fully hereinafter set forth. The value of the interests of Katherine Moore and Constance Moore was assessed as being the entire amount of the trust funds bequeathed for their benefit.

XIV.

The Commissioner of Internal Revenue, as claimants aver, never made any lawful assessment of any tax, in accordance with Sections 29 and 31 of said Act of June 13, 1898, and amendments, on account of the life interests of Ruth Moore Lee and Faith Moore, and the annuities of Ella L. Moore, Wilson Godfrey and Louisa Godfrey. Disregarding the facts conditioning and determining the actual or clear value of such interests, the amount of said pretended assessment was arbitrarily determined in accordance with the pre-
18 tended general rule or regulation fully set forth in paragraph XII of this Petition, and substantially in the manner following, to wit:

1. The Commissioner having determined that one third of the net residuary estate amounted to $785,000.24, assumed, as required by said pretended general rule or regulation, that the trust funds for the benefit of the two daughters for life, described in the fourteenth clause of the will, arising from the residuary estate, were established and duly vested in the Trustee thereof, immediately upon the death of the testator, and that the income from a trust fund of $785,000.24 commenced immediately, that is to say, on June 23, 1899, to accrue to and for the use and benefit of each of said daughters.

2. It was further assumed, as required by said pretended general rule or regulation, that the said trust fund would produce an annual income amounting to four per centum of the full amount thereof, that is to say, that, as the amount of the said trust fund was $785,-000.24, it was assumed that an annual income of $31,400.01 would accrue therefrom to the use and benefit of each of said daughters.

3. It was further assumed, as required by said pretended general rule or regulation, that the whole income thereafter to accrue to the use and benefit of each of said daughters, on account of and from the said trust fund, during the whole period of her life, was discountable for cash on June 23, 1899, at the discount rate of four per centum per annum for all future payments and on the basis of the expectancy

of life of persons of her age, on said June 23, 1899, as indicated by the selected mortuary tables adopted by the Commissioner of Internal Revenue.

4. Relying upon the foregoing assumptions, and as Ruth Moore Lee was twenty-five years of age on June 23, 1899, the Commissioner of Internal Revenue multiplied the present worth of the right
19 of a person of said age to receive the sum of one dollar at the end of each year during life, as shown (on the basis of said assumed discount rate of four per centum per annum and the expectancy of life therein estimated) in the tables constituting a part of said pretended general rule or regulation, that is to say, the sum of $17.80274, by 31,400.01, and obtained, as the product, the sum of $559,006.21, which said Commissioner thereupon assumed to be the clear value of the aforesaid interest of Ruth Moore Lee.

5. Applying to $559,006.21, obtained as aforesaid, the rate of $1.87½ per one hundred dollars, the Commissioner of Internal Revenue obtained the sum of $10,481.37, which the Commissioner thereafter certified to the said Collector of Internal Revenue for the Third District of New York as the amount of the said pretended tax which he claimed to have assessed against the said interest of Ruth Moore Lee.

6. In like manner, as Faith Moore was twenty-one years of age on June 23, 1899, said Commissioner multiplied the present worth of the right of a person of said age to receive the sum of one dollar at the end of each year during life, as so shown in said tables, that is to say, the sum of $18.32932, by 31,400.01, and obtained, as the product, the sum of $575,540.83, which said Commissioner thereupon assumed to be the clear value of the aforesaid interest of Faith Moore, and then applying to $575,540.83 the rate of $1.87½ per one hundred dollars, said Commissioner obtained the sum of $10,791.39, which said Commissioner certified to said collector as the amount of the said pretended tax which he claimed to have assessed against the said interest of Faith Moore.

7. Said Commissioner assessed the tax on the annuities of Ella L. Moore, Wilson Godfrey and Louisa Godfrey in accordance with the said pretended rule or regulation by assuming that trust funds
20 producing the amounts of the several annuities were established immediately upon the death of the testator, and that the income therefrom commenced immediately upon the testator's decease to accrue for the benefit of the annuities. He further assumed that trust funds were set apart for the payment of said annuities which would yield an annual income of four per centum thereon, and accordingly assumed as to the annuity of $6,000 payable to Ella L. Moore that a trust fund of $120,000 was so set apart, and that the said annual income of $6,000 arising therefrom for the use of Ella L. Moore during the whole period of her life was discountable for cash on June 23, 1899, at the discount rate of four per centum per annum for all future payments and on the basis of the expectancy of life of persons of her age, on said June 23, 1899, as indicated by said mortuary tables. Relying upon the foregoing assumptions, and as Ella L. Moore was forty-nine years of age on

June 23, 1899, said Commissioner ascertained the value of the said interest of Ella L. Moore in a manner similar to that applied in the case of the testator's daughters by multiplying the present worth of the right of a person of said age to receive the sum of one dollar at the end of each year during life, as shown in said tables, that is to say, the sum of $12.7516, by 6,000, thus obtaining as the product $76,542.96, which said Commissioner therefore assumed to be the clear value of the aforesaid interest of Ella L. Moore, and he assessed a tax thereon at the rate of $1.12½ per one hundred dollars, amounting to $861.11.

8. In similar manner, and by the use of the same assumptions and tables, said Commissioner assessed the tax on the annuities of $1,200 each, payable to Wilson Godfrey and Louisa Godfrey, by assuming that a trust fund of $30,000 was set apart for each, and by the method hereinbefore described, arrived at the following figures:

	Age.	Present worth of $1 annually.	Present worth of $1,200 annually.	Rate.	Tax.
Wilson Godfrey	62	$8.78052	$10,536.62	3.00	$316.10
Louisa Godfrey	59	9.73131	11,677.57	5.00	583.88

21

XV.

The claimants aver that in truth and fact the rate of income realized and paid to the said Ruth Moore Lee and Faith Moore prior to July 1, 1902, from the said residuary trust funds was not as much as four per centum per annum, and that the amount of income so received was much less than the amounts of income so assessed by said Commissioner, and that the life interests not only of the said Ruth Moore Lee and Faith Moore, but of Ella L. Moore, Wilson Godfrey and Louisa Godfrey were not discountable or saleable for the amounts so assessed as their values by said Commissioner, and they further aver that neither by said act of June 13, 1898, nor by any other authority was the Commissioner of Internal Revenue empowered thus arbitrarily to prescribe a rate of interest or discount, or to adopt a series of mortuary tables of his own choosing and selection, or to make the assumptions hereinbefore described, and that in so doing he acted contrary to law, and that the assessment and collection of the taxes hereinbefore described were erroneous and illegal, and they claim the refund of such taxes, as follows:

Name.	Relationship.	Property.	Assessed value.	Rate charged.	Amount of tax collected.
Ruth Moore Lee	Daughter	Life interest in $785,000.24	$559,006.21	.01875	$10,481.37
Faith Moore	Daughter	Life interest in $785,000.24	575,540.83	.01875	10,791.38
Ella L. Moore	Sister	Annuity of $6,000	76,542.96	.01125	861.10
Wilson Godfrey	Uncle	Annuity of $1,200	10,536.62	.03	316.10
Louisa Godfrey	None	Annuity of $1,200	11,677.57	.05	583.88
					$23,033.83

XVI.

Not waiving but insisting upon the claims hereinbefore made, and in the event that the court shall not allow such claims in full, the claimants further represent that Sections 1819, 2718, 2721 and 2722 of the Code of Civil Procedure of the State of New York were
22 in force at the time of the death of John G. Moore, and thereafter until July 1, 1902, and for a considerable period after said date, and that said sections, with the omission of a portion of Section 2718 not material to this case, were as follows:

"Section 1819. If, after the expiration of one year from the granting of letters testamentary or letters of administration, an executor or administrator refuses, upon demand, to pay a legacy, or distributive share, the person entitled thereto may maintain such an action against him, as the case requires. But for the purpose of computing the time, within which such an action must be commenced, the cause of action is deemed to accrue, when the executor's or administrator's account is judicially settled, and not before."

"Section 2718. The executor or administrator at any time after the granting of his letters, may insert a notice, once in each week for six months in such newspaper or newspapers printed in the county as the surrogate directs, requiring all persons having claims against the deceased to exhibit the same, with the vouchers therefor, to him, at a place to be specified in the notice, at or before a day therein named, which must be at least six months from the day of the first publication of the notice. * * * If a suit be brought on a claim which is not presented to the executor or administrator within six months from the first publication of such notice, the executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin before such suit was commenced."

"Section 2721. No legacy shall be paid by any executor or administrator until after the expiration of one year from the time of granting letters testamentary or of administration, unless directed by the will to be sooner paid. If directed to be sooner paid, the executor or administrator may require a bond, with two sufficient sureties, conditioned, that if debts against the deceased duly appear, and there are not assets to pay the same, and no other assets sufficient to pay other legacies, then the legatees will refund the legacy
23 so paid, or such ratable portion thereof with the other legatees, as may be necessary for the payment of such debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee, and that if the probate of the will, under which such legacy is paid, be revoked, or the will declared void, that such legatee will refund the whole of such legacy, with interest, to the executor or administrator entitled thereto. After the expiration of one year, the executors or administrators must discharge the specific legacies bequeathed by the will and pay the general legacies, if there be assets. If there are not sufficient assets, then an abatement of the general

legacies must be made in equal proportions. Such payment shall be enforced by the surrogate in the same manner as the return of an inventory, and by a suit on the bond of such executor or administrator whenever directed by the surrogate."

"Section 2722. In either of the following cases a petition may be presented to the surrogate's court, praying for a decree, directing an executor or administrator to pay the petitioner's claim, and that he be cited to show cause why such a decree should not be made:

"1. By a creditor, for the payment of a debt, or of its just proportional part, at any time after six months have expired since letters were granted.

"2. By a person entitled to a legacy, or any other pecuniary provision under the will, or a distributive share, for the payment or satisfaction thereof, or of its just proportional part, at any time after one year has expired since letters were granted.

"On the presentation of such a petition, the surrogate must issue a citation accordingly; and on the return thereof, he must make such a decree in the premises as justice requires. But in either of the following cases the decree must dismiss the petition without prejudice to an action or an accounting, in behalf of the petitioner:

"1. When an executor or administrator files a writen answer, duly verified, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity and legality, absolutely, or on information and belief.

24 "2. Where it is not proved, to the satisfaction of the surrogate, that there is money or other personal property of the estate, applicable to the payment or satisfaction of the petitioner's claim and which may be so applied, without injuriously affecting the rights of others, entitled to priority or equality of payment or satisfaction."

XVII.

Beginning on or about April 25, 1900, the claimants as executors inserted a notice, once in each week for six months, in the newspapers printed in said New York County directed by the Surrogate thereof, requiring all persons having claims against the said testator to exhibit the same, with the vouchers thereof, to the claimants, at a place specified in said notice, at or before the first day of November, 1900.

XVIII.

Prior to July 1, 1902, the claimants created and set up the trust funds bequeathed for the benefit of Ella L. Moore, Sarah H. Aldrich, Wilson Godfrey and Louisa Godfrey, and paid therefrom to said beneficiaries the annual amounts to which each was entitled under the will, and paid to Harry B. Moore, as trustee for Katherine Moore and Constance Moore, the two sums of $20,000 each described in the will, and paid and delivered to the several legatees in full all the legacies, except the residuary legacies described in the fourteenth clause. In respect of the residuary legacies, the claimants appointed the Atlantic Trust Company of New York City as trustee of the three trust funds described in the fourteenth clause, and prior to July 1,

1902, paid and delivered to said Trust Company for each of the said three trust funds $183,333.33 in cash, and stocks and bonds of the testator's estate deemed by the claimants suitable for the
25 permanent investment of the residuary estate, of the value of $242,753.33, an aggregate value for each trust fund of $426,-086.66, which amount constituted all the property received by said Trust Company as and for each of said trust funds prior to July 1, 1902.

XIX.

On July 1, 1902, the administration of the estate of John G. Moore by the claimants as executors was incomplete and unfinished, and except as to the said three funds of the value of $426,086.66 each, no property of the said estate had vested in the Atlantic Trust Company as Trustee of the residuary estate, and the amount and value of the residuary estate, except as to the said three funds of the value of $426,086.66 each, remained entirely contingent and indeterminate, for the following reasons:

(1) The claimants were directed by the testator's will to convert into money the residuary estate, except such part thereof as should consist of stocks and bonds of the kind and character therein specified, and which the claimants should deem suitable for the permanent investment of the residuary estate, and the claimants were endowed with the discretion of determining which stocks and bonds should be converted into money and which should be set apart as suitable for the permanent investment of the residuary estate, and this direction had not been exercised by the claimants prior to July 1, 1902, except as to the said three funds then previously turned over to said trust company.

(2) Under the sections of the New York Code of Civil Procedure hereinbefore set out, and the law of the State as established by judicial decisions, all the assets of the testator's estate continued to be subject to the payment of claims of creditors of the estate, notwithstanding the publication of the notice to creditors herein-
26 before described, so long as such assets should remain in the hands of the claimants as executors, and all the residuary estate, so far as reduced to possession, remained in the hands of the claimants as executors on July 1, 1902, except said three funds of $426,086.66 each.

(3) Under the laws and judicial decisions of the State of New York the assets of the estate continued liable to be subjected to the payment of claims against the testator's estate until there should be a judicial settlement of the accounts of the claimants as executors, and there had been no judicial settlement of the accounts of the claimants as executors prior to July 1, 1902.

XX.

On July 1, 1902, the clear value of the interests passing under the fourteenth clause of said will, except as to the said amounts already paid or delivered to said Trust Company as trustee was in all respects

indeterminate and uncertain, and the interests of Ruth Moore Lee and Faith Moore under said clause, except as to their interests in the amounts already paid or delivered to said Trust Company, were contingent beneficial interests which had not absolutely vested in possession or enjoyment, and accordingly the claimants are entitled to a refund of taxes as exhibited by the following table:

Ruth Moore Lee—Amount of fund received by Atlantic Trust Co. prior to July 1, 1902	$426,086.66	
Estimated income at four per cent	17,043.47	
Present worth, age 25, rate 17.80274	303,420.46	
Tax on this at rate of .015	4,551.31	
Tax paid on life interest in $785,000.24 at rate of .01875	10,481.37	
Difference, being the tax thus refundable		$5,930.06
27		
Faith Moore—Amount of fund received by Atlantic Trust Co. prior to July 1, 1902	$426,086.66	
Estimated income at four per cent	17,043.47	
Present worth, age 21, rate 18.32932	312,395.21	
Tax on this at rate of .015	4,685.93	
Tax paid on life interest in $785,000.24 at rate of .01875	10,791.38	
Difference, being the tax thus refundable		6,105.45
		$12,035.51

XXI.

Irrespective of the ruling of the court upon the claims hereinbefore made, the claimants represent that the amount of the tax collected upon the interests of Katherine Moore and Constance Moore, to wit, a tax of $300 each imposed on the entire amount of the trust fund of $20,000 bequeathed for the benefit of each, was collected on contingent beneficial interests which had not become absolutely vested in possession or enjoyment prior to July 1, 1902, both as to the particular estate to which each was entitled prior to attaining the age of twenty-one (since under the testator's will the trustee, Harry B. Moore, was vested with discretion as to how much, if any, of the income should be applied to the benefit of each), and also as to the remainder, to vest upon the beneficiary's attaining the age of twenty-one, and the amount of such tax, $600 in all, should be refunded to the claimants under the terms of the said act of June 27, 1902.

XXII.

The claimants are advised by counsel and therefore aver as follows:

1. That no tax was imposed under the said act of June 13, 1898,

and amendments, upon the life interests of Ruth Moore Lee
28 and Faith Moore, and upon the annuity interests of Ella L. Moore, Wilson Godfrey and Louisa Godfrey.

2. That the Commissioner of Internal Revenue had no authority or power to make or enforce the said pretended general rule or regulation set forth in paragraph XII, of this petition, or to adopt or use a general rate of discount or interest in the assessment of taxes under said act, and that the pretended assessment made in accordance therewith upon the said interests was erroneous and illegal, within the meaning of the act of July 27, 1912, and that the amount of the tax thereon collected, to wit, $23,033.83, should be refunded to the claimants under the terms of said act.

3. That if propositions 1 and 2, above, shall not be sustained by the court, and the taxes shall not be refunded to the claimants in accordance therewith, then, that so much of the tax collected upon the life interests of Ruth Moore Lee, to wit, $10,481.37, and Faith Moore, to wit, $10,791.38, as was in excess of the tax payable upon the life interests of said persons in the amount of the trust funds paid and delivered by the claimants to the Atlantic Trust Company prior to July 1, 1902, for the benefit of said persons, was a tax collected on contingent beneficial interests which had not become absolutely vested in possession or enjoyment prior to July 1, 1902, within the meaning of the act of June 27, 1902, and the amount thereof, $12,035.51, should be refunded to the claimants under the terms of said act.

4. That irrespective of the ruling of the court upon propositions 1, 2 and 3, the taxes assessed on the interests of Katherine Moore and Constance Moore were collected on contingent beneficial interests which had not become absolutely vested in possession or enjoyment prior to July 1, 1902, within the meaning of the act of June 27, 1902, and the amount thereof, $600, should be refunded to the claimants under the terms of said act.

In respect of all the taxes herein claimed to be refunded, the claimants pray the benefit both of the said act of June 27, 1902, and the said act of July 27, 1912.

29 XXIII.

The claimants duly presented to the Commissioner of Internal Revenue, on October 29, 1907, their claim and application, whereby they claimed a refund of the sum of $21,640.55, or such greater amount as the Commissioner of Internal Revenue might find to be refundable under the said act of June 27, 1902, or under other remedial statutes.

XXIV.

Subsequent to the presentation of said claim, the claimants were advised by letters received from the Deputy Commissioner of Internal Revenue, that said Deputy Commissioner held that said claim should be allowed in the sum of $1,728.50 and rejected for the balance. The method of computing this sum of $1,728.50 was, as the claimants are informed and believe, to ascertain the difference

between the tax assessed on the trust funds of beneficiaries other than the daughters and the tax collectible on the amounts actually received by the same persons prior to July 1, 1902, which difference was thus found to be $1,760.33, and to reassess the tax of Ruth Moore Lee at $12,500.80, an increase of $15.69, and the tax of Faith Moore at $12,811.29, an increase of $16.14, and to deduct the sum of these two increases, $31.83, from $1,760.33.

On June 2, 1908, the claimants filed their petition in this court, and on July 10, 1908, the said Collector of Internal Revenue advised the claimants that their claim had been rejected by the Treasury Department for the reason that suit had been instituted for the recovery of the tax.

No portion of the tax paid as hereinbefore described by the claimants as executors has been refunded to the claimants, and the whole thereof is now retained by the United States.

30 XXV.

The claimants are the sole owners of the claim herein set forth, and the only persons interested therein, and no assignment or transfer of this claim, or any part thereof or interest therein, has been made. The claimants are justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets. The claimants are citizens of the United States and have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; and the claimants believe the facts as stated in this petition to be true.

XXVI.

The claimants claim twenty-three thousand six hundred and thirty-three and 83/100 dollars ($23,633.83), and pray that judgment therefor may be rendered against the United States, and that the claimants may have such other and further relief as to the court may seem meet.

THOMAS MILLS DAY,
Attorney for Claimants.

STATE OF NEW YORK,
County of New York, ss:

Thomas Thacher, being duly sworn, deposes and says: I am one on the claimants in this case and one of the executors of the estate of John G. Moore; I have read the above petition, and the matters therein stated are true to the best of my knowledge and belief.

THOMAS THACHER.

Subscribed and sworn to before me this 16th day of March, 1917.

RICHARD L. DAVISSON,
Notary Public, New York County.

31 EXHIBIT A.

Last Will and Testament of John G. Moore.

1, John G. Moore, of the City, County and State of New York, make, publish and declare this to be my

Last Will and Testament.

First: I direct that my just debts and funeral expenses be paid.

Second: I give to my sister, Ella L. Moore, the sum of ten thousand dollars ($10,000).

Third: I give to Florence Godfrey, daughter of Wilson and Louisa Godfrey, the sum of ten thousand dollars ($10,000).

Fourth: I give to Jessie Godfrey, daughter of Wilson and Louisa Godfrey, the sum of ten thousand dollars ($10,000).

Fifth: I give to my brother, Harry B. Moore, the sum of ten thousand dollars ($10,000).

Sixth: I give to my sister, Vida F. Moore, of Steuben, Maine, the sum of ten thousand dollars ($10,000).

Seventh: I give to each of my daughters, Ruth Moore and Faith Moore, the sum of one hundred thousand dollars ($100,000).

Eighth: To each domestic, servant or employe in my service, or in the service of any member of my immediate family, in
32 either of my houses, or in either of my stables, at the time of my death, and who shall have been in such service continuously for five years or more, I give a sum of money to be ascertained by multiplying one hundred dollars ($100) by the number of years such domestic, or servant or employe shall have so served me or my family.

Ninth: I give to my brother, Harry B. Moore, two sums of ten thousand dollars ($10,000) each, in trust to invest and keep invested one of said sums for each of his two children, Katherine and Constance, and to pay to, or use or apply in any way he shall see fit for the benefit of, each of said children, the income of one of said sums or such part thereof as he shall see fit, accumulating the remainder, during her minority, or if she shall die under twenty-one years of age, during her life, and to pay over the principal of one of said sums together with the accumulations of income appertaining thereto, if any there be, to each of said children absolutely on her attaining the age of twenty-one years, or, in case of her death before attaining the age of twenty-one years, upon her death, to pay over such principal and accumulations to her issue, if any there be, or, failing such issue, to pay over such accumulations to the survivor of said two children forthwith, and to pay to, or use or apply in any way my said brother shall see fit for the benefit of, such survivor the income of the principal sum to which the child so dying would have been entitled had she lived to the age of twenty-one years, during the minority of such survivor; or, if such survivor shall die under twenty-one years of age, during her life; and to pay over such principal sum to such survivor absolutely on her attaining the age

of twenty-one years; or, in case of her death before attaining the age of twenty-one years, upon her death to pay over such principal sum to her issue. In the event that both of said children shall die under the age of twenty-one years, without issue, I give the
33 principal of both said sums, and such accumulations of income as there shall then be, upon the death of the survivor, to my brother, Harry B. Moore, if then living, or, if he shall then have died, to the person or persons who would have been entitled, under the laws of the State of New York, to receive the same, had my brother then died intestate and possessed of the same, and in the same proportions.

I direct that each of the bequests hereinbefore made be paid in money as soon after my decease as can be conveniently done.

Tenth: I give to my daughters, Ruth Moore and Faith Moore, share and share alike, my personal jewelry, the miniatures, silver plate and china which belonged to their mother, and the library formed by her and enumerated in the catalogue thereof privately printed in 1892; and I give to my daughter Ruth the painting by Dupré and to my daughter Faith the painting by Diaz, which paintings were bought by me at the sale of the Fuller collection, and are now in the house No. 11 East Sixty-fifth Street.

Eleventh: I give to my wife, Louise Hartshorne Moore, my stable No. 120 East Sixty-sixth Street in the Borough of Manhattan, City of New York, and the equipments thereof and furnishings therein, and all my horses, carriages, harnesses, horse blankets and carriage robes, rugs and fittings belonging to me at the time of my decease; and I hereby confirm the gift made by me to my said wife at the time of our marriage, of all my pictures, works of art, objets de vertu, bric-a-brac, furniture and household effects then in the house No. 11 East Sixty-fifth Street, in said Borough and City, and give her all like things since placed by me in said house and therein at the time of my death, except the two paintings and other things mentioned in the paragraph of this will numbered "Tenth."

Twelfth: I give to my wife, Louise Hartshorne, and my
34 daughters, Ruth and Faith, share and share alike, my house and stable in the township of Winter Harbor, Hancock County, Maine, together with the household furniture and ornaments in said house, and the equipment and furnishings of said stable, and also all other lands and real estate situated in the said township of Winter Harbor, or in the township of Gouldsboro, in said County and State, of which I shall die seized.

I direct that all taxes and charges upon all the aforesaid bequests, legacies and devises, be paid by my Executors, so that the legatees and devisees shall receive the same without charge or diminution.

Thirteenth: I direct my Executors as soon after my decease as they conveniently can, to create four distinct funds, and for that purpose to set aside from my estate, or to purchase with the moneys of my estate and set aside, bonds or stocks, or both, of the kind hereinafter mentioned in this paragraph, as follows, to wit:—

1. A fund deemed by them sufficient to yield, free of all taxes and other charges, an annual net income of six thousand dollars ($6,000).

2. A fund deemed by them sufficient to yield, free of all taxes and other charges, an annual net income of one thousand dollars ($1,000).

3. A fund deemed by them sufficient to yield, free of all taxes and other charges, an annual net income of twelve hundred dollars ($1,200).

4. A fund deemed by them sufficient to yield, free of all taxes and other charges, an annual net income of twelve hundred dollars ($1,200).

I give the stocks and bonds constituting said funds to my Executors, or such of them as shall qualify, the survivors or survivor of them, their successor or successors, in trust, to pay from the fund first mentioned, in semi-annual, or if convenient, more frequent instalments, to my sister, Ella L. Moore, six thousand dollars
35 ($6,000) per annum during her life, using first the net income of said fund, and then if that be insufficient, so far as necessary, the principal thereof; to pay from the fund next above mentioned, in semi-annual, or if convenient more frequent instalments, to Mrs. Sarah H. Aldrich, one thousand dollars ($1000) per annum during her life, using first the net income of said fund, and then if that be insufficient, so far as necessary, the principal thereof; to pay from the fund next above mentioned, in semi-annual, or if convenient more frequent instalments, to Wilson Godfrey, twelve hundred dollars ($1200) per annum durng his life, using first the net income of said fund, and then if that be insufficient, so far as necessary, the principal thereof; and to pay from the fund next above mentioned, in semi-annual, or if convenient more frequent instalments, to Louisa Godfrey, wife of the said Wilson Godfrey, twelve hundred dollars ($1200) per annum during her life, using first the net income of said fund, and then is that be insufficient, so far as necessary, the principal thereof; and upon the further trust to pay over, transfer and assign the principal of each of said funds (or so much thereof as shall remain unexpended) upon the death of the person entitled to receive an annual income therefrom during life as aforesaid, to my daughters, Ruth Moore and Faith Moore, in equal shares, or to the survivor of them, if either of them shall then have died, leaving no issue then susviving, or, if one shall have died leaving issue then surviving; to such issue and the survivor; or, if both shall then have died, either or both leaving issue then surviving, to such issue; the issue in any of the aforesaid cases taking the share which the parent of such issue would have taken if then living, or, if neither of my said daughters, nor issue of either, be then living, to the person or persons who would have been entitled, under the laws of the State of New York, to receive the said property, had I then died intestate, and seized or possessed of the same, and in the same proportions.

36 I authorize my Executors, or such of them as shall qualify, the survivors or survivor of them, at any time to appoint as their or his successor in the trust created by this paragraph, any Trust Company doing business in the City of New York, and to transfer, assign, and pay over to such Trust Company, any and all stocks, bonds and moneys belonging in said funds at that time, upon

the trusts, and with the powers and duties as provided in this paragraph.

I authorize and empower my said Executors or such of them as shall qualify, the survivors or survivor of them, and any successor Trustee, to sell any of the bonds or stocks in which any part of any of said funds may be invested, when in their, his or its discretion it may be advisable, and to reinvest any part of any of said funds in bonds secured by mortgage upon real estate, or in bonds or stocks of the United States, or of any State, City or County of the United States, or in the bonds and stocks of any dividend paying railroad company or other corporation.

Fourteenth: I direct my Executors to convert into money the rest, residue and remainder of my estate, real, personal and mixed, except such part thereof as shall then consist of stocks and bonds of the kind and character hereinafter mentioned, and which my Executors shall deem suitable for the permanent investment of my residuary estate, and to divide the same into three equal parts or shares, and to pay, assign, transfer and deliver all said residuary estate, whether money, stocks or bonds so divided, to such Trust Company doing business in the City of New York, as they, my said Executors shall appoint, to which Trust Company I hereby give and bequeath the same in trust to invest and keep the same invested in bonds secured by mortgage upon real estate, or in bonds or stocks of the United States or of any State, City or County of the United States, or
37 in the bonds or stocks of any dividend paying railway company or other corporation, and upon the further trust to receive the income thereof and to hold, manage and dispose of such income and of the said stocks and bonds as follows, to wit:

1. To pay the net income of one such share, semi-annually or oftener as shall be convenient, to my wife, Louise Hartshorne Moore, during her life, and upon her death to pay, transfer, assign and deliver the principal of such share to her issue by me begotten, share and share alike; or, failing such issue, in equal shares to my daughters Ruth Moore and Faith Moore, or to the survivor of them if either of them shall then have died leaving no issue then surviving, or if one shall have died leaving issue then surviving, to such issue and the survivor, or if both shall then have died, either or both leaving issue then surviving, to such issue; the issue in any of the aforesaid cases taking the share which the parent of such issue would have taken if then living; or if neither of my said daughters nor issue of either be then living, to the person or persons who would have been entitled under the laws of the State of New York to receive the said part or share had I then died intestate and seized or possessed of the same, and in the same proportions.

2. To pay the net income of another of said shares to my daughter, Ruth Moore, semi-annually or oftener as shall be convenient, during her life, and upon her death to pay, transfer, assign and deliver the principal of such share to her issue, if any there be then surviving, in equal parts, or in case she shall leave no issue, to pay the income of said share semi-annually or oftener as convenient, to my daughter, Faith Moore, during her life, and upon her death to pay, transfer, assign and deliver the principal of said share to her issue, if any

there be, then surviving, or if she leave no issue her surviving, to the person or persons who would have been entitled under the
38 laws of the State of New York to receive the said share had I then died intestate and seized or possessed of the same, and in the same proportions.

3. To pay the net income of another of said shares to my daughter, Faith Moore, semi-annually or oftener as shall be convenient, during her life, and upon her death to pay, transfer, assign and deliver the principal of such share to her issue, if any there be then surviving, in equal parts, or in case she shall leave no issue, to pay the income of said share, semi-annually or oftener as convenient, to my daughter Ruth Moore, during her life, and upon her death to pay, transfer, assign and deliver the principal of said share to her issue, if any there be then surviving, or if she leave no issue her surviving to the person or persons who would have been entitled under the laws of the State of New York, to receive the said share had I then died intestate and seized or possessed of the same, and in the same proportions.

I authorize my Executors hereinafter named, or such of them as shall qualify, if they shall deem it advisable, to pay all legacy or inheritance taxes and charges upon my residuary estate, so that the same may be received by the Trustee free from such tax or charge, both in respect to the life estates, and the estates by way of remainder therein.

Fifteenth: I appoint my wife, Louise Hartshorne Moore, guardian of the persons of my daughters, Ruth Moore and Faith Moore, during their respective minorities.

Sixteenth: I appoint my partner, Grant B. Schley, and my counsel John W. Simpson and Thomas Thacher, of New York City, Executors of my last will and testament. If any of them shall for any reason be unable or unwilling to act as such Executor, or having qualified shall resign, or shall cease to be such Executor, I appoint William M. Barnum in his place Executor of this will, and in like manner if another of said first named three, or the said Wil-
39 liam M. Barnum, shall be unable or unwilling to act as such Executor, or having qualified, shall resign or shall cease to be such Executor, I appoint Philip G. Bartlett, in his place, Executor of this will.

I direct that no bond be required from my said Executors, or any one of them.

I authorize and empower my Executors and such of them as shall qualify and shall be acting as such for the time being, to sell and convey my real estate and any part or parts thereof, and to sell and dispose of any and all stocks, bonds and other personal property of whatsoever kind forming part of my residuary estate, at such time or times, at such price or prices, and upon such terms as they in their discretion may deem expedient, and to obtain possession of, liquidate and realize upon, my interest in the firm of Moore & Schley and the business thereof at such time or times and in such manner and upon such terms as shall in their judgment best conserve and promote the interests of my estate. And having great confidence in the sound judgment, integrity and friendship of my partners, I

desire that my said Executors in so closing out my interest in the firm of Moore & Schley, shall consult with my said partners, and shall be guided by their advice whenever the interests of my estate in the judgment of my Executors will permit, and shall cause no other or greater embarrassment or injury to the business of said firm or the interests of my partners therein than to my said Executors shall seem necessary in the premises.

Seventeenth: I revoke all former wills by me made.

In witness whereof, I, John G. Moore, have to this my last will and testament written upon eight sheets of paper, subscribed my name and set my seal in the presence of the persons whose names are subscribed hereto as witnesses, at the same time acknowledging and declaring the same to be my last will and testament this seventh day of December in the year one thousand eight hundred and ninety-eight.

(Signed) JOHN G. MOORE.

Signed, sealed, published and declared by the above-mentioned John G. Moore, as and for his last will and testament, in the presence of us, who, at his request, and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto, this seventh day of December, in the year One thousand eight hundred and ninety-eight.

ALFRED B. THACHER,
44 West 44th Street, New York City.

HAMILTON H. DURAND,
45 west 35th Street, New York City.

SAMUEL F. JARVIS, Jr.,
225 East 17th Street, New York City.

I, John G. Moore, of the City, County and State of New York, having made my last will and testament bearing date the seventh day of December, in the year one thousand eight hundred and ninety-eight, now make this Codicil to be taken as a part of the same.

First: Instead of two sums of ten thousand dollars ($10,000) each, I give my brother, Harry B. Moore, two sums of twenty thousand dollars ($20,000) each, upon the trusts and for the purposes set forth in the paragraph numbered "Ninth" of my said will; that is to say; it is my will that said paragraph shall be construed and carried into effect, as if the two sums therein mentioned were sums of twenty thousand dollars ($20,000) each, instead of sums of ten thousand dollars ($10,000) each.

Second: I give to Adoniram Judson Parritt of Steuben, Maine, husband of my deceased aunt, the sum of one thousand dollars ($1,000); and I direct that the same be paid in money as soon after my decease as can be conveniently done, free of all taxes and charges.

Third: I give to Millie Rhodes, now living at 161 Halsey Street, Brooklyn, forty dollars ($40) per month, or four hundred and eighty dollars ($480) annually, during her life, and I direct

41 my Executors to secure and to provide for the payment thereof by the purchase of an annuity, or by the creation of a trust fund, or otherwise, as they in their discretion may deem best.

Fourth: I authorize and empower my executors to pay, settle, compromise or otherwise deal with any and all claims and demands upon me or my estate in their discretion.

Fifth: I hereby revoke the appointment of my partner, Grant B. Schley, as one of my executors. I do this because in view of the extent of his own business interests and the demands upon his time and strength, I am unwilling to impose this charge upon him.

It is my intention that the Sixteenth paragraph of my will shall stand as though the words "my partner, Grant B. Schley, and" were omitted after the words "I appoint," at the beginning of said paragraph.

Sixth: Except as in this Codicil otherwise appears, I hereby ratify and confirm my said will in every respect.

In witness whereof, I, the said John G. Moore, have to this codicil to my last will, subscribed my name and set my seal, in the presence of the persons whose names are subscribed hereto as witnesses, at the same time acknowledging and declaring the same to be a Codicil to my last will, this Eighteenth day of May, in the year One thousand eight hundred and ninety-nine.

(Signed) JOHN G. MOORE.

Signed, sealed, published and declared by the above named John G. Moore, as and for a Codicil to his last will and testament, in the presence of us and each of us, who at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto this eighteenth day of May in the year one thousand eight hundred and ninety-nine.

SAMUEL F. JARVIS, JR.,
225 East 17th Street, New York City.

WILLO F. MILLER,
27 East 30th Street, City.

JOHN S. STURGES,
Hackensack, N. J.

42 III. *General Traverse.*

Court of Claims.

No. 30176.

JOHN W. SIMPSON and THOMAS THACHER, as Executors of the Estate of John G. Moore, Deceased,

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on

the part of the defendants, a general traverse is entered as provided by Rule 34.

IV. *History of Further Proceedings.*

On March 20, 1918, the case was argued and submitted on merits by Mr. Thomas Mills Day, for the claimants, and by Mr. Charles H. Bradley, for the defendants.

On May 6, 1918 the court filed findings of fact and conclusions of law and entered judgment for claimants in the sum of $600.00.

On May 31 1918 the claimants filed a motion for a new trial, and to amend the court's findings.

On June 10, 1918 the court filed an order overruling claimants' motion for a new trial and allowing in part and overruling in part motion to amend. Former findings and judgment were withdrawn and amended findings of fact and conclusion of law were filed, which are as follows:

43 V. *Findings of Fact and Conclusions of Law.*

Filed June 10, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimants' decedent, John G. Moore, late of the County and State of New York, and a resident of the Third Internal Revenue District of New York, died in said State on June 23, 1899, leaving a last will and testament, and codicil thereto. On June 30, 1899 said last will and testament, and codicil, were admitted to probate in the Surrogate's Court of said New York County, and letters testamentary were issued to the claimants as executors thereof. A copy of said will and codicil is annexed to the claimants' petition and is made a part of these findings of fact by this reference thereto. The claimants still continue to be the duly qualified and acting executors of said will and codicil.

II.

By the second, seventh, ninth, tenth, twelfth, thirteenth and fourteenth clauses of said will, and the first cause of the codicil thereto, legacies were bequeathed by the testator which were, on or about April 1, 1901, assessed and taxed by the United States Commissioner of Internal Revenue, under authority of the war revenue Act of June 13, 1898 (30 Stats., 448), as follows:

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Names of persons entitled to beneficial interest in said property.	Age.	Relationship of beneficiary to person who died possessed.	Clear value of legacy.	Amount taxable	Rate for every $100.	Amount of tax.
Ruth Moore Lee	25	Daughter	$100,000.00			
"	..	"	6,000.00			
"	..	"	866.67	$665,872.88	$1.875	$12,485.11
Ruth Moore Lee, life int. in $785,000.24	..	"	559,006.21			
Faith Moore	21	"	100,000.00			
"	..	"	6,000.00			
"	..	"	866.67	682,407.50	1.875	12,795.15
Faith Moore, life int. in $785,000.24	..	"	575,540.83			
Ella L. Moore	49	Sister	10,000.00	86,542.96	1.125	973.61
Ella L. Moore, annuity of $6,000	..	"	76,542.96			
Katherine Moore	..	Niece	20,000.00	20,000.00	1.50	300.00
Constance Moore	..	"	20,000.00	20,000.00	1.50	300.00
Wilson Godfrey, annuity of $1,200	62	Uncle	10,536.62	10,536.62	3.00	316.10
Louisa Godfrey, annuity of $1,200	59	None	11,677.57	11,677.57	5.00	583.88
Total						27,753.85

III.

Upon demand of the United States Collector of Internal Revenue for said Third District of New York, the claimants, on or about April 15, 1901, paid to said Collector said tax of $27,753.85, which was in due course remitted by him to the United States. No protest against the payment of said tax is either shown or claimed to have been made by the claimants.

IV.

Subsequent to the testator's death, his daughter Ruth Moore married Arthur H. Lee, and is still living, and without issue. Faith Moore is still living, and unmarried. The testator's widow and Ella L. Moore and Louisa Godfrey are also still living. Wilson Godfrey died October 2, 1907. Katherine Moore and Constance Moore are still living. At the death of the testator, Katherine Moore was six years of age, Constance Moore was three years of age, and the testator's widow, Louise H. Moore, was 32 years of age. The ages of the remainder of the legatees named in finding II above are as shown in said finding.

V.

The computation and assessment of said tax was made in accordance with certain general rules, tables and introductions pre-
45 scribed and promulgated by the Commissioner of Internal Revenue on December 16, 1898, as follows, the expectancies of life upon which said tables were based being expectancies shown by standard mortality tables:

Tables Showing the Present Worth of an Annuity, Life Interest, and of a Reversionary Interest, with Instructions for the Use thereof in the Computation of Tax on Legacies and Distributive Shares.

Instructions Concerning the Tax on Legacies and Distributive Shares.

Treasury Department,

Office of the Commissioner of Internal Revenue.

Washington, D. C.,
December 16, 1898.

The following tables, showing the present worth of an annuity, life interest, and of a reversionary interest, with explanatory notes and examples, are hereby published and promulgated for the use of internal-revenue officers, and administrators, executors, or trustees in determining the duty or tax to be paid to the United States upon legacies or distributive shares arising from personal property, imposed by the Act of June 13, 1898, entitled 'An act to provide ways and means to meet war expenditures, and for other purposes.'

N. B. SCOTT,
Commissioner.

Approved:
O. L. SPAULDING,
Acting Secretary of the Treasury.

"Legacy Taxes.

"Table, Single-life, 4 per Cent., Showing the Present Worth of an Annuity, or Life Interest, and of a Reversionary Interest, with Explanatory Notes and Examples.

"[United States Internal-Revenue Adjustment, 1898.]

Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.	Age.	Mean redemption period.	Annuity, or present value of one dollar due at the end of each year during the life of a person of specified age.	Reversion, or present value of one dollar due at the end of the year of death of a person of specified age.
10.....	38.891	$19.45359	$0.21332	26.....	31.747	$17.65984	$0.28231
11.....	38.507	19.36943	0.21656	27.....	31.239	17.51224	0.28799
12.....	38.113	19.28184	0.21993	28.....	30.725	17.35968	0.29386
13.....	37.710	19.19065	0.22344	29.....	30.205	17.20225	0.29991
14.....	37.298	19.09590	0.22708	30.....	29.678	17.03961	0.30617
15.....	36.877	18.99764	0.23086	31.....	29.147	16.87176	0.31262
16.....	36.447	18.89569	0.23478	32.....	28.608	16.69846	0.31929
17.....	36.010	18.79010	0.23884	33.....	28.067	16.51964	0.32617
18.....	35.565	18.68070	0.24305	34.....	27.516	16.33503	0.33327
19.....	35.113	18.56751	0.24740	35.....	26.961	16.14437	0.34060
20.....	34.652	18.45038	0.25191	36.....	26.401	15.94755	0.34817
21.....	34.186	18.32932	0.25656	37.....	25.834	15.74427	0.35599
22.....	33.711	18.20416	0.26138	38.....	25.263	15.53421	0.36407
23.....	33.230	18.07471	0.26636	39.....	24.685	15.31722	0.37241
24.....	32.742	17.94097	0.27150	40.....	24.101	15.09295	0.38104
25.....	32.248	17.80274	0.27682	41.....	23.511	14.86102	0.38996

42.....	22.915	14.62122	0.39918	71.....	7.532	6.02612	0.72976
43.....	22.313	14.37356	0.40871	72.....	7.151	5.74003	0.74077
44.....	21.708	14.11860	0.41852	73.....	6.782	5.45928	0.75157
45.....	21.103	13.85713	0.42857	74.....	6.425	5.18402	0.76215
46.....	20.499	13.58958	0.43886	75.....	6.081	4.91463	0.77251
47.....	19.896	13.31698	0.44935	76.....	5.749	4.65125	0.78264
48.....	19.298	13.03942	0.46002	77.....	5.428	4.39383	0.79254
49.....	18.703	12.75716	0.47088	78.....	5.119	4.12486	0.80220
50.....	18.113	12.47032	0.48191	79.....	4.823	3.89858	0.81159
51.....	17.527	12.17919	0.49311	80.....	4.537	3.66071	0.82074
52.....	16.947	11.88408	0.50446	81.....	4.262	3.42900	0.82965
53.....	16.372	11.58531	0.51595	82.....	3.995	3.20258	0.83836
54.....	15.804	11.28325	0.52757	83.....	3.737	2.98024	0.84691
55.....	15.243	10.99789	0.53931	84.....	3.484	2.76106	0.85534
56.....	14.689	10.66982	0.55116	85.....	3.236	2.54366	0.86371
57.....	14.143	10.35931	0.56310	86.....	2.992	2.32795	0.87200
58.....	13.603	10.04630	0.57514	87.....	2.752	2.11384	0.88024
59.....	13.072	9.73131	0.58726	88.....	2.517	1.90115	0.88842
60.....	12.549	9.41474	0.59943	89.....	2.286	1.69107	0.89650
61.....	12.029	9.09765	0.61163	90.....	2.062	1.48540	0.90441
62.....	11.532	8.78052	0.62382	91.....	1.845	1.28432	0.91214
63.....	11.039	8.46412	0.63600	92.....	1.637	1.09024	0.91961
64.....	10.557	8.13888	0.64812	93.....	1.442	0.90647	0.92667
65.....	10.088	7.83552	0.66017	94.....	1.263	0.73687	0.93320
66.....	9.630	7.52476	0.67212	95.....	1.103	0.58435	0.93906
67.....	9.185	7.21699	0.68396	96.....	0.975	0.46182	0.94378
68.....	8.753	6.91298	0.69565	97.....	0.877	0.36698	0.94742
69.....	8.333	6.61301	0.70719	98.....	0.746	0.24038	0.95229
70.....	7.926	6.31716	0.71857	99.....	0.500	0.00000	0.96154

46 "Example 1. A person dying bequeaths to his nephew, aged forty years, an annuity of one thousand dollars during life. What is the present value of the annuity?

"Reference to the foregoing table shows that the present value of one dollar a year, payable at the end of each year during the life of a person aged forty years, is fifteen dollars nine cents two mills and ninety-five one-hundredths of a mill ($15.09295); therefore the present value of one thousand dollars is one thousand times as much, or fifteen thousand and ninety-two dollars and ninety-five cents, the amount upon which tax accrues.

"Example 2. A person dying bequeaths to his daughter, aged thirty-five years, a life interest in personal property amounting to fifty thousand dollars ($50,000), the estate to revert absolutely at her death to other parties. Required the present value, at the date of death of the testator, of the life interest of the daughter in the estate; also, required at the same date, the present value of the reversionary interest of said other parties in the estate.

"At a net interest of four per cent per annum, the assumed rate, the estate of $50,000 will realize an income or annuity of $2,000 per annum. The present value of the sum of $1.00, payable at the end of each year during the life of a person aged thirty-five years, is found by the table to be $16.14437, and the present value of an annuity of $2,000 for the same time would be two thousand times as much, or $32,288.74, the amount upon which tax accrues.

"The reversion or present value of $1.00, due at the end of the year of death of a person aged thirty-five years, is found by the table to be $0.34060, and such value of $50,000 would be fifty thousand times as much, or $17,030, the amount upon which tax accrues.

"NOTE.—This table is based on the 'actuaries' or combined experience table,' money being worth 4 per cent per annum.

"The first column shows the age of the person under consideration.

"The second column shows the corresponding 'mean redemption period' and represents the time in years in which the present values of annuities and reversions certain will become equal, respectively, to the present values of annuities and reversions contingent on the duration of life.

"The 'mean redemption period' is a mean between the last payment of the annuity and the payment of the reversion, averaging six months later than the former payment and six months earlier than the latter payment.

"The third column shows the present value of an annuity for life of one dollar per annum, the last payment being made at the end of the year prior to the one in which death occurs.

"The fourth column shows the present worth of one dollar payable at the end of the year in which death occurs.

"NOTE.—This adjustment has been prepared under the direction of Mr. J. S. McCoy, Government actuary.

"Present Value of Annuities and Reversions Certain upon a 4 per Cent Basis.

Number of years.	Present worth of an annuity of one dollar, payable at the end of each year, for a certain number of years.	Present worth of one dollar, payable at the end of a certain number of years.	Number of years.	Present worth of an annuity of one dollar, payable at the end of each year, for a certain number of years.	Present worth of one dollar, payable at the end of a certain number of years.
1	$0.96154	$0.961538	16	$11.65229	$0.533908
2	1.88609	0.924556	17	12.16567	0.513373
3	2.77509	0.888996	18	12.65929	0.493628
4	3.62989	0.854804	19	13.13394	0.474642
5	4.45182	0.821927	20	13.59032	0.456387
6	5.24214	0.790314	21	14.02916	0.438834
7	6.00205	0.759918	22	14.45111	0.421955
8	6.73274	0.730690	23	14.85684	0.405726
9	7.43533	0.702587	24	15.24696	0.390121
10	8.11089	0.675564	25	15.62208	0.375117
11	8.76047	0.649581	26	15.98277	0.360689
12	9.38507	0.624597	27	16.32958	0.346816
13	9.98565	0.600574	28	16.66306	0.333477
14	10.56312	0.577475	29	16.98371	0.320651
15	11.11839	0.555265	30	17.29203	0.308319

"Example. A man dies leaving personal property to the amount of $50,000, his daughter to have the income from it for 20 years; it then to revert to his youngest son. What is the present worth of these legacies?

"The income from $50,000 would be $2,000 per annum, assuming money at 4 per cent.

"The present worth of an annuity of $2,000 for 20 years will be 2,000 times an annuity of $1.00 for 20 years. In the table opposite 20 we find the value of an annuity of $1.00 to be $13.59032; therefore the present worth of an annuity of $2,000 will be $27,180.64.

"A reversion of $1.00 at the end of 20 years is shown by the table to be $0.456387, and a reversion of $50,000 will be 50,000 times as much, or $22,819.35."

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VI.

Of the taxes collected from the claimants the following were assessed upon life interests and annuities in accordance with the said general rules, tables and instructions set forth in Finding V above.

		Assessed value.	Tax rate.	Tax.
Ruth Moore, daughter.	Life interest in $785,000.24	$559,006.21	.01875	$10,481.37
Faith Moore, daughter.	Life interest in $785,000.24	575,540.83	.01875	10,791.38
Ella L. Moore, sister.	Life annuity of $6,000.	76,542.96	.01125	861.10
Wilson Godfrey, uncle.	Life annuity of $1,200.	10,536.62	.03	316.10
Louisa Godfrey, stranger.	Life annuity of $1,200.	11,677.57	.05	583.88

VII.

Beginning on or about April 25, 1900, the claimants, pursuant to and in accordance with the provisions of Section 2718 of the Code of Civil Procedure of the State of New York, inserted a notice once in each week for a period of six months preceding November 1, 1900, in newspapers printed in said New York County, requiring all persons having claims against the said testator to exhibit the same, with the vouchers thereof, to the claimants, at a place specified in the notice, on or before the first day of November, 1900.

VIII.

The testator's estate consisted principally of securities and of his interest in the partnership of Moore & Schley, bankers and brokers, of New York, in which he was a partner at the time of his death.

48 His interest in this firm was thirty-five per cent. of all partnership assets and liabilities, the appraised value of which interest was $1,026,059.42. The amount of cash owned by the testator at the time of his death was small.

IX.

Prior to July 1, 1902, the claimants created and set up the trust funds bequeathed for the benefit of Ella L. Moore, Sarah H. Aldrich, Wilson Godfrey and Louisa Godfrey, and paid therefrom to said beneficiaries the annual amounts to which each was entitled under the will, and paid to Harry B. Moore, as trustee for Katherine Moore and Constance Moore, the two sums of $20,000 each provided in the will, and paid and delivered to the several legatees in full all the legacies, except the residuary legacies described in the fourteenth clause of the will. In respect of the residuary legacies, the claimants appointed the Atlantic Trust Company of New York City as trustee of the three trust funds described in the said fourteenth clause of the will, and prior to July 1, 1902, paid and delivered to said Trust Company for each of the said three trust funds $183,333.33 in cash, and stocks and bonds of the testator's estate, deemed by the claimants suitable for the permanent investment of the residuary estate, of the value of $242,753.33, making an aggregate value for each trust fund of $426,086.66, which amount constituted all the funds or property received by said Trust Company as and for each of said trust funds prior to July 1, 1902.

After making these payments to the Atlantic Trust Company the claimants had on hand $49,021.38 cash in bank, and $548,948.41 cash on account with the firm of Moore & Schley, making a total of $597,969.79, and also had on hand securities of the value of approximately $1,200,000. At this time the business relations be-
49 tween the testa- and said firm of Moore & Schley remained unsettled, awaiting liquidation of the firm's accounts.

X.

On July 1, 1902, the administration of the estate of the said John G. Moore by the claimants was incomplete and unfinished; and except as to said three trust funds with the Atlantic Trust Company of the value of $426,086.66 each, no property of said estate had vested in said Trust Company as trustee of the residuary estate.

From July 1, 1902, to March 16, 1906, the claimants made further payments to the Atlantic Trust Company, and to its successor, the Metropolitan Trust Company, into which the Atlantic Trust Company was merged, amounting to approximately $500,000 for each of said three trust funds; and after the latter date property still remained in the estate for administration, and further payments have since been made to said trust funds therefrom. On November 23, 1917, said estate had not yet been closed, and property of approximately the value of $120,000 then remained in the hands of the executors for administration.

XI.

Prior to July 1, 1902, claims and debts against said estate amounting to $53,504.19 (exclusive of claims against the partnership of Moore & Schley) were paid by the executors; and on that date there

still existed unsettled claims to a considerable amount against the estate or for which the estate was liable. Among these claims was a claim against the partnership of Moore & Schley on which suit was begun or or about March 4, 1902, for a large amount of alleged promoters' profits in connection with the organization of the American Malt Company. Suit was brought in the right of said
50 company in a stockholders' action for an accounting for $12,500,000 of preferred stock, $13,740,000 of common stock, and $9,000,000 cash.

The evidence does not show either the amount or the merits of said claim for promoters' profits, nor does it show either the merits or the result of said suit for an accounting, or the pleadings therein, or the issues or character of the suit further than appears above.

Some time after July 1, 1902 claim was made against said estate by the John L. Roper Lumber Co. for 875 shares of the common stock of the Norfolk & Southern Railroad Co., worth several thousand dollars, which claim was rejected by the executors in February, 1904, and was thereafter abandoned by said company. There was also presented against the estate in 1908 a claim of the receiver of the Columbus, Sandusky & Hocking Valley Railroad Co., upon which a judgment of $20,077.95 was recovered in August, 1915, which was satisfied by payment by the executors of about $15,000 in October, 1915.

XII.

On or about October 29, 1907 the claimants presented to the Commissioner of Internal Revenue a claim for the refund of the sum of $21,640.55 of the said taxes paid by them, or such greater amount thereof as the Commissioner might find to be refundable, under the refunding act of June 27, 1902, 32 Stats., 406, or other remedial statutes. Upon final consideration of the claim it was rejected by the Commissioner, shortly after the filing of the claimants' petition in this court on June 2, 1908.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that upon authority of Vanderbilt v. Eidman,
51 196 U. S., 480, and Uterhart v. United States, 240 U. S., 598, the claimants are entitled to recover the amount of the tax shown by Finding II to have been assessed and collected upon the legacies of Katherine Moore and Constance Moore, and that for the other items of the claim the claimants are not entitled to recover, and the petition as to them is dismissed.

It is therefore adjudged and ordered by the court that the claimants recover of and from the United States the sum of Six Hundred Dollars ($600).

52 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Tenth day of June, A. D. 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the claimants, and do order, adjudge and decree that John W. Simpson and Thomas Thacher, as executors of the estate of John G Moore, deceased, are entitled to recover and shall have and recover of and from the defendants, the United States, the sum of Six Hundred Dollars ($600.00).

By THE COURT.

VII. *Claimants' Application for and Allowance of Appeal.*

From the judgment rendered in the above entitled cause on the Tenth day of June, 1918, the claimants make application for and give notice of an appeal to the Supreme Court of the United States.

THOMAS M. DAY,
Attorney for Claimants.

Filed July 12, 1918.

Ordered: That the above appeal be allowed as prayed for.
Sept. 13, 1918.

EDWARD K. CAMPBELL,
Chief Justice.

53 Court of Claims.

No. 30176.

JOHN W. SIMPSON and THOMAS THACHER, as Executors of the Estate of John G. Moore, Deceased,

vs.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the court; of the judgment of the court; of the claimants' application for, and allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 14" day of September, A. D. 1918.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,765. Court of Claims. Term No. 679. John W. Simpson and Thomas Thacher, as executors of the estate of John G. Moore, deceased, appellants, vs. the United States. Filed September 23d, 1918. File No. 26,765.

FEB 19 1920
JAMES D. BAKER,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 213.

JOHN W. SIMPSON AND THOMAS THACHER, AS EXECUTORS OF THE ESTATE OF JOHN G. MOORE, DECEASED,

Appellants,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

THOMAS M. DAY,
Attorney for Appellants.

H. T. NEWCOMB,
Of Counsel.

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Supreme Court of the United States,

OCTOBER TERM, 1919.

No. 213.

JOHN W. SIMPSON and THOMAS THACHER, as Executors of the Estate of John G. Moore, deceased, Appellants,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLANTS.

Statement of the Case.

This is an appeal from a judgment of the Court of Claims, entered on a petition for the recovery of certain legacy taxes imposed on the appellants, as Executors of the Estate of John G. Moore, under the provisions of the War Revenue Act of 1898.

The Court of Claims gave judgment for the claimants for the sum of $600, and for the defendant as to the sum of $23,033.83, which the claimants further claimed.

The issues raised by the appeal are, in brief, the following:

1. Whether life interests could lawfully be taxed on their arithmetical present worths derived by the use of mortuary tables and at an arbitrarily assumed rate of interest, and

2. Whether, if so taxable, the taxes may be recovered which were paid on interests in so much of the residuary

estate as was, on July 1, 1902, unadministered and still subject to the payment of debts and expenses.

The testator, who was a resident of the County and State of New York, died on June 23, 1899, leaving a will and codicil which were probated in the Surrogate's Court of New York County on June 30, 1899 (R. 31).

By the testator's will (R. 24) he made divers absolute bequests, and further provided for the setting aside of certain trust funds for the payment of annuities for life, namely, to Ella L. Moore, his sister, an annuity of $6.000; to Wilson Godfrey, his uncle, and to Louisa Godfrey, unrelated, annuities of $1,200 each, and to Sarah H. Aldrich, unrelated, an annuity of $1,000.

He also gave funds of $20,000 each in trust for the benefit of his two nieces, Katherine and Constance Moore, the income or part thereof to be applied for their benefit while minors, and the principal and accumulations of income to be paid to each upon attaining majority. He gave his residuary estate to a trust company to be appointed by his executors (the Atlantic Trust Company was so appointed), to be divided into three trust funds for the benefit for life, respectively, of his wife and two daughters, Ruth Moore, who became by marriage Ruth Moore Lee, and Faith Moore, with remainders not necessary to be considered here.

On April 1, 1901, the Commissioner of Internal Revenue assessed legacy taxes against the appellants as executors in the sum of $27,753.85, which the appellants paid without protest on April 15, 1901 (R. 31, 33).

The taxes sought to be recovered by the claimant's petition were the following:

1. The taxes assessed against the annuities of Ella L. Moore, Wilson Godfrey and Louisa Godfrey and against the life interests of the two daughters in the residuary estate, amounting in the aggregate to $23,033.83 (R. 17), on the ground that these taxes were erroneously and

illegally assessed and collected by the use of mortuary tables and by the arbitrary assumption of a rate of discount, and should be refunded under the Act of July 27, 1912.

2. If this claim should not be allowed in full, so much of the taxes assessed upon the life interests of the two daughters as was in excess of the taxes payable upon their life interests in the amount of the trust funds turned over to the Atlantic Trust Company as trustee prior to July 1, 1902, on the ground that the balance of their interests in the residuary estate was unadministered and still subject to the payment of debts and expenses, and hence was a contingent beneficial interest which had not become absolutely vested in possession or enjoyment prior to the last named date. Such taxes were sought to be recovered under the Act of June 27, 1902, and amounted to $12,035.51 (R. 22).

3. The taxes assessed on the interests of Katherine and Constance Moore, amounting to $600, which were assessed on the entire amount of their trust funds, including both the particular estates prior to their attaining the age of twenty-one, and the remainders thereafter (R. 21).

The court below gave judgment for the claimants as to class 3, on the authority of *Uterhart* v. *U. S.*, 240 U. S. 598, and *Vanderbilt* v. *Eidman*, 196 U. S. 480, and dismissed the petition otherwise (R. 40). There is no cross appeal by the Government.

The appellants' claim for refund was filed with the Commissioner of Internal Revenue on October 29, 1907, and was rejected by the Commissioner shortly after the filing of the petition in the Court of Claims, which was on June 2, 1908 (R. 40).

Specification of Errors.

1. The court below erred in dismissing the appellants' petition as to the taxes assessed on the annuities of Ella L. Moore, Wilson Godfrey and Louisa Godfrey, and on the life interests of the two daughters, Ruth Moore Lee and Faith Moore, in the residuary estate, amounting in the aggregate to $23,033.83, which said taxes were erroneously and illegally assessed and collected by the use of mortuary tables and by the arbitrary assumption of a rate of discount.

2. The court below erred in dismissing the appellants' petition as to the taxes assessed upon the life interests of the two daughters in the residuary estate, in excess of the taxes payable upon their life interests in the amount of the trust funds turned over to the Atlantic Trust Company prior to July 1, 1902, which said excess taxes, amounting to $12,035.51, were assessed on interests in the residuary estate which were unadministered and still subject to the payment of debts and expenses, and hence were contingent beneficial interests which had not become absolutely vested in possession or enjoyment prior to the last named date.

BRIEF OF THE ARGUMENT.

First Specification of Errors.

The court below erred in dismissing the appellant's petition as to the taxes assessed on the annuities of Ella L. Moore, Wilson Godfrey and Louisa Godfrey, and on the life interests of the two daughters, Ruth Moore Lee and Faith Moore, in the residuary estate, amounting in the aggregate to $23,033.83, which said taxes were illegally assessed and collected by the use of mortuary tables and by the arbitrary assumption of a rate of discount.

No Protest Was Necessary.

Before going into the merits we consider at this point two possible objections to the maintenance of our case.

There was, as found by the court below (R 33), no protest against the payment of this tax.

The fact that the tax was voluntarily paid, without protest, is, however, no obstacle to our recovery.

Rand v. *United States,* 249 U. S. 503.

Claim Was Duly Made.

In the Rand case, above cited, which involved to a certain extent similar questions, the case was dismissed on the ground that the claimant had not filed a claim with the Commissioner of Internal Revenue. In our case, however, the claim was filed by the appellants with the Commissioner on October 31, 1907 (R. 40). It fell within the description, therefore, of one of the two classes

of claims described in section 2 of the act of July 27, 1912, namely, claims presented prior to January 1, 1914, and complied with the provisions of R. S. 3226.

Sage v. *United States,* 250 U. S. 33, 38.

The Taxing Act Must Be Strictly Construed.

We desire, further, to point out that in applying the act of 1898, it must be construed strictly against the government and in favor of the taxpayer.

Eidman v. *Martinez,* 184 U. S. 578.

Gould v. *Gould,* 245 U. S. 151.

Summary of the Taxes Assessed by the Use of Mortuary Tables, and the Method of Assessment.

Of the total taxes paid by the appellants, amounting to $27,753.85, taxes amounting to $23,033.83 were assessed upon life estates and annuities, as follows (R. 38):

		Assessed value.	Tax Rate.	Tax.
Ruth Moore (Lee), daughter.	Life interest in $785,000.24	$559,006.21	.01875	$10,481.37
Faith Moore, daughter.	Life interest in $785,000.24.....	575,540.83	.01875	10,791.38
Ella L. Moore, sister.	Life Annuity of $6,000.	76,542 96	.01125	861.10
Wilson Godfrey, uncle.	Life Annuity of $1,200.....	10,536.62	.03	316.10
Louisa Godfrey, stranger.	Life Annuity of $1,200.....	11,677.57	.05	583.88
				$23,033.88

The interest of each daughter above assessed was her life interest in one-third of the residuary estate.

These taxes were assessed by the Commissioner of Internal Revenue in accordance with certain general rules, tables and instructions prescribed and promulgated by him on December 16, 1898, printed in full on pages 33 to 38 of the Record.

From an inspection of these rules it appears that the Commissioner, disregarding the facts determining the actual or clear value of the life interest of Ruth Moore Lee, arbitrarily fixed the amount of the assessment on her life interest in the residuary estate in the manner following:

1. The Commissioner having determined that one-third of the residuary estate amounted to $785,000.24, assumed, as required by said rules, that the trust funds for the benefit of the two daughters for life, described in the fourteenth clause of the will (R. 27), arising from the residuary estate, were established and duly vested in the Trustee thereof, immediately upon the death of the testator, and that the income from a trust fund of $785,000.24 commenced immediately, that is to say, on June 23, 1899, to accrue for the use and benefit of each of the daughters.

2. It was further assumed, as required by the rules, that such trust fund would produce an annual income amounting to four per cent of the full amount thereof, that is to say, as the amount of the trust fund was $785,000.24, it was assumed that an annual income of $31,400.01 would accrue therefrom for the use and benefit of each of the daughters.

3. It was further assumed, as required by the rules, that the whole income thereafter to accrue for the use and benefit of each of the daughters, on account of and from such trust fund, during the whole period of her life, was discountable for cash on June 23, 1899, at the discount rate of four per cent per annum, for all future payments, and on the basis of the expectancy of life of persons of her age, on June 23, 1899, as indicated by the mortuary tables adopted by the Commissioner and contained in the rules.

4. Relying upon the foregoing assumptions, and since Ruth Moore Lee was twenty-five years of age on June

23, 1899, the Commissioner multiplied the present worth of the right of a person of said age to receive the sum of one dollar at the end of each year during life, as shown (on the basis of the assumed discount rate of four per cent per annum and the expectancy of life therein estimated) in the tables constituting a part of the rules, that is to say, the sum of $17.80274, by 31,400.01, and obtained, as the product, the sum of $559,006.21, which the Commissioner thereupon assumed to be the clear value of the aforesaid interest of Ruth Moore Lee.

5. Applying to $559,006.21, obtained as aforesaid, the rate of $1.87½ per one hundred dollars, the Commissioner obtained the sum of $10,481.37, which the Commissioner assessed as the amount of the tax on the said interest of Ruth Moore Lee.

In like manner, since Faith Moore was twenty-one years of age on June 23, 1899, the Commissioner multiplied the present worth of the right of a person of that age to receive the sum of one dollar at the end of each year during life, as shown in the tables, that is to say, the sum of $18.32932, by 31,400.01, and obtained, as the product, the sum of $575,540.83, which the Commissioner thereupon assumed to be the clear value of the aforesaid interest of Faith Moore, and then applying to $575,540.83 the rate of $1.87½ per one hundred dollars, the Commissioner obtained the sum of $10,791.39, which the Commissioner assessed as the tax on the said interest of Faith Moore.

The Commissioner assessed the tax on the life annuities of Ella L. Moore, Wilson Godfrey and Louisa Godfrey in accordance with the rules by assuming that trust funds producing the amounts of the several annuities were established immediately upon the death of the testator, and that the income therefrom commenced immediately upon the testator's decease to accrue for the benefit of the annuitants. He further assumed that the annual income

of $6,000 arising therefrom for the use of Ella L. Moore during the whole period of her life was discountable for cash on June 23, 1899, at the discount rate of four per cent per annum, for all future payments, and on the basis of the expectancy of life of persons of her age, on June 23, 1899, as indicated by the mortuary tables.

Relying upon the foregoing assumptions, and since Ella L. Moore was forty-nine years of age on June 23, 1899, the Commissioner ascertained the value of the said interest of Ella L. Moore in a manner similar to that applied in the case of the testator's daughters by multiplying the present worth of the right of a person of said age to receive the sum of one dollar at the end of each year during life, as shown in the tables, that is to say, the sum of $12.7516, by 6,000, thus obtaining as the product $76,542.96, which the Commissioner thereupon assumed to be the clear value of the aforesaid interest of Ella L. Moore, and he assessed a tax thereon at the rate of $1.12½ per one hundred dollars, amounting to $861.11.

In similar manner, and by the use of the same assumptions and tables, the Commissioner assessed the tax on the annuities of $1,200 each, payable to Wilson Godfrey and Louisa Godfrey, and by the method hereinbefore described, arrived at the following figures:

	Age	Present worth of $1 annually	Present worth of $1,200 annually	Rate	Tax
Wilson Godfrey....	62	$8.78052	$10,536.62	3.00	$316.10
Louisa Godfrey....	59	9.73131	11,677.57	5.00	583.88

No taxes were assessed against the life interests of the widow and of Sarah H. Aldrich, the former because of her specific exemption under the terms of the law, and the latter, because the arbitrary method of assessing her interest adopted by the Commissioner led to a result which was less than $10,000 and hence not taxable.

There was never any lawful assessment of the legacy tax in respect of the life interests and annuities bequeathed by the testator.

Section 31 of the Act of June 13, 1898, made R. S. 3182 applicable to the taxes created by Section 29 of that Act, and R. S. 3182 "required" the Commissioner of Internal Revenue—

> "to make the inquiries, determinations, and assessments of all taxes and penalties"

arising thereunder. (R. S. 3182 is applicable. *Dodge* v. *Osborne, Commissioner,* 240 U. S. 118, 119-120.)

Soon after the passage of the Act of June 13, 1898, the Commissioner of Internal Revenue appears to have conceived the idea that it was not necessary to make particular "assessments" or "inquiries" as to certain of the taxes for which the new statute provided, but that he was empowered to make the required "determinations and assessments" without special inquiry concerning particular cases, and by groups or what may be termed "wholesale" methods. To that end the general rule set forth in finding V (R. 33-38) was promulgated on December 16, 1898. On the same date the Commissioner of Internal Revenue issued Treasury Decision No. 20,442, which is, in part, as follows:

> "Legacies in the nature of a life beneficiary interest and remaindermen's interest are both taxable. The values of said interests are to be determined by approved tables, which have been prepared by the Government actuary. The tables referred to are published in this issue of Treasury Decisions, as decision No. 20,443" (T. D. 20,442).

The "approved tables", referred to in the foregoing, are those to be found in finding V of the Court of Claims,

in accordance with which the taxes were assessed upon the life interests and annuities (R. 38).

The following "example", found on page 32 of the Record, constitutes a part of the general rule and illustrates the manner in which that rule was applied in the present case.

> "Example 2. A person dying bequeaths to his daughter, aged thirty-five years, a life interest in personal property amounting to $50,000, the estate to revert absolutely at her death to other parties. Required the present value, *at the date of* death of the testator, of the life interest of the daughter in the estate, . . .
>
> "At a net interest of *four per cent* per annum, *the assumed rate,* the estate of $50,000 will realize *an income or annuity* of $2,000 per annum. The *present value* of the sum of $1.00, payable at the end of each year during the life of a person aged thirty-five years, is found by the table to be $16.14437, and the *present value of an annuity of $2,000* for the same time would be two thousand times as much, or $32,288.74, the *amount on which the tax accrues*" (R. 36).

Certain words in the foregoing have been italicized for the purposes of this brief.

Let us now consider how the rule was applied in the case of the older daughter, Ruth Moore Lee.

The Commissioner first arbitrarily assessed the value of the principal of the trust fund directed to be set aside for the benefit of each daughter, namely, one-third of the residuary estate, at $785,000.24 (R. 6), although the administration of the estate was incomplete, the debts and expenses chargeable against the estate had not been learned, the amount of the residuary estate had not been established, and the trust funds to be set up therefrom had not been ascertained in the hands of the executors or turned over to the trustee thereof.

He then assumed that the income from a trust fund of

$785,000.24 commenced to accrue for the benefit of each daughter from the testator's death.

He then assumed that the trust fund of each daughter would produce an annual income at the rate of four per cent.

Applying these assumptions and the adopted rules and putting the problem in the form of example 2, above quoted, it takes the following form:

> "At a net interest of *four per cent* per annum, *the assumed rate*, the (assumed) estate of $785,000.24 will realize *an income or annuity* of $31,400.01 per annum. The *present value* of the sum of $1.00, payable at the end of each year during the life of a person aged twenty-five years, is found by the table to be $17.80274, and the *present value of an annuity of $31,400.01* for the same time would be 31,400.01 times as much, or $559,006.21, the *amount on which the tax accrued.*"

The value of the life interest of Mrs. Lee was accordingly assessed at $559,006.21. In like manner, the value of the life interest of Faith Moore, the other daughter, who was twenty-one years old, was assessed at $575,540.83.

In order to arrive at a valuation of the three life annuities, one of $6,000 and the other two of $1,200 per year, the Commissioner made the same general assumptions, and applied the method illustrated by example 1 of his rules (R. 36). Inserting in this example the facts and figures as to the annuity of Ella L. Moore, the problem takes this form:

> "Example 1. A person dying bequeaths to his sister, aged 49 years, an annuity of $6,000 during life. What is the present value of the annuity?
>
> "Reference to the foregoing table shows that the present value of one dollar a year, payable at the end of each year during the life of a person aged 49 years, is $12.75716; therefore the present value of $6,000 is 6,000 times as much, or $76,542.96, the amount upon which tax accrues."

In like manner, the value of the annuities of $1,200 each of Wilson Godfrey, aged 62, and Louisa Godfrey, aged 59, were assessed at $10,536.62 and $11,677.57, respectively.

All these assessments were made in this simple fashion.

In other words, for all the so called "assessments" made by the application of this rule, it was conclusively "assumed" that four per cent would be earned by every trust fund, and that future payments had a present *taxable* worth equal to the sum which, at four per cent per year, would produce them when due. By means of this general rule all taxes on life interests and annuities under the War Revenue Act of 1898 were calculated, and there was no specific investigation by the Commissioner as to the expectancy of life of the respective beneficiaries, or as to the earning capacity of the respective trust funds, otherwise than by the application of these tables.

This general rule was enforced by the Treasury Department in such rigorous and undeviating temper that the interest of a legatee *already deceased* was "valued", and the "tax" collected, as though she would live for thirty years (*Kahn* v. *Herold,* 147 Fed. 575, 583), and that of a legatee who received an annuity charged on a fund sufficient to produce it at three and one-half per cent, was "assessed" as though four per cent of the fund would be paid instead of the smaller amounts directed by the will (*Peck* v. *Kinney,* 143 Fed. 76, 77-81).

There is no presumption of law that future payments can be discounted at any particular rate of interest or that the future duration of a life in being will coincide with average "expectancies" (*Louisville & Nashville* v. *Holloway,* 246 U. S. 525). Moreover, "local conditions are not to be disregarded" (*Chesapeake & Ohio* v. *Kelly,* 241 U. S. 485, 490).

As said in a recent case in New York:

> "The tables of mortality are at best only slight evidence of the expectancy of life of any particu-

> lar person to be considered in connection with the proof of his health, constitution, habits and mode of living. (*Schell* v. *Plumb*, 55 N. Y. 292.) Such tables show only the average length of life among the classes whose lives are taken into consideration in preparing the tables. There are several tables, which differ quite widely, and it goes without saying that in any given case the habits and manner of living of the individual may be totally different from those considered in preparing the tables." *Hartley* v. *Eagle Insurance Co.*, 222 N. Y. 178, 186.

The term "present worth" belongs to the nomenclature of mathematics. It is a derivative of (1) an interest rate (known or assumed) and (2) a sum of money to be paid at a certain future date or sums to be paid upon certain future dates. At four per cent yearly $10,000 to be paid at the end of one year has a "present worth" of $9,615.38, because $9,615.38 multiplied by 1.04 (that is, increased by four per cent of itself) is $10,000. In different sections of the United States and upon different grades of security, money has, in recent years, been loaned at rates at least as low as two per cent and as high as twelve per cent per year. The "present worth" of $10,000 to be paid in one year at each rate from two to twelve per cent per annum is shown below:

Interest rate per year, per cent.	Present worth of $10,000 to be paid at end of one year.
2	$9,803.92
3	9,708.74
4	9,615.38
5	9,523.81
6	9,433.96
7	9,345.79
8	9,259.26
9	9,174.31
10	9,090.91
11	9,009.01
12	8,928.57

The foregoing affords a very simple illustration of the arithmetical principle involved. It shows that in laying down the general rule and "assuming" the interest rate (perhaps, in this use, more properly to be termed a rate of *discount*) of four per cent, the Commissioner of Internal Revenue controlled the "value" assigned to every future payment of definite amount. Moreover, by determining upon four per cent, he assigned to every such payment a *higher* "value" than would have been assigned had he adopted a higher rate of interest. *The lower the rate of interest the higher must be the "present worth" of any future payment.*

Ignoring for the purposes of the argument, at this point, other assumptions, involved in the general rule, which appear to be without warrant, it is observed that *the selection of the rate of discount to be applied to future payments controlled the amount of the tax demanded.* The lower the rate of discount selected, the higher the burden of taxation that would result, for the "present worth" of future payments, as has been shown, increases as the rate of discount decreases. The amount at which the arbitrary general rule adopted by the Commissioner of Internal Revenue would have "valued" an annual income of $600 payable for thirty years is compared, in the following table, with the amounts that would have resulted if he had used different rates of interest.

If the Commissioner had used—	Present worth of one dollar payable at end of each year for thirty years.	Present worth of $600 payable at end of each year for thirty years.	Amount of tax.	
			If left to a lineal descendant.	If left to a stranger in blood.
2 per cent.....	$22.39346 (1)	$13,436.08	$100.77	$671.80
3 per cent	19 60044 (1)	11,760.26	88.20	588.01
4 per cent.....	17.29203 (2)	10,375.22	77.81	518.76
5 per cent.....	15.37245 (1)	9,223.47	nothing	nothing
6 per cent.....	13.76483 (1)	8,258.90	nothing	nothing
7 per cent.....	12.40904 (1)	7,445.42	nothing	nothing
8 per cent.....	11.25778 (1)	6,754.67	nothing	nothing

(1) *From "Robinsonian Complex Interest Simplified;" by J. Watts Robinson, Boston, published by the author, 1899.*

(2) From the general rule of "assessment" promulgated by the Commissioner of Internal Revenue (*R. 37*).

The figures in the table show that, within the limits of rates of interest commonly paid in commercial transactions in different sections of the country, if the Commissioner had the power he attempted to exercise, the legacy of $600 per annum *could have been made taxable or exempted from taxation.* The tax could have been augmented by the plausible expedient of lowering the discount rate or reduced to nothing merely by choosing five instead of four per cent. A legacy of $550 per annum for the same period would have been taxable if three per cent were used, exempt with the use of four per cent. At five per cent (which, as will be seen, was the rate established for a similar purpose in New York), a legacy of $1,500 per annum passing to a stranger in blood would have been "valued" at $23,058.68 and taxed $1,152.93; at three per cent the same legacy would have been "valued" at $29,400.66 and taxed (the rate being increased fifty per cent because the legacy was "valued" at over $25,000) $2,205.05.

The legacy for the benefit of Wilson Godfrey, an annuity of $1,200, was assessed by the Commissioner as having a present worth of $10,536.62 (R. 32; brief, p. 9), that being 1,200 times $8.78052, the present worth of $1 at age 62 and at a rate of interest of *four* per cent., as shown by the tables adopted by the Commissioner, the actuaries' or combined experience tables (R. 36). If the Commissioner had applied the rate of *five* per cent., instead of *four* per cent., the present worth of the same annuity would have been valued at $9,817.92, that being 1,200 times $8.1816, the present worth of $1 at the same age and at a rate of interest of *five* per cent., as shown by the same actuaries' or combined experience tables (*Wolfe on Inheritance Tax Calculations*, 215). Thus, at a rate of five per cent., the legacy of Wilson Godfrey, against which a tax of $316.10 was assessed, would have been free from tax, since legacies of less than $10,000 are exempt. On the other hand, if the Commissioner had seen

fit to adopt a rate somewhat less than four per cent., the present worth of the annuity of Sarah H. Aldrich, which was exempted from tax, would have been brought above $10,000 and thus made taxable.

Thus, this arbitrary general rule controlled the amount exacted from each person subject to the tax as fully as the rate of tax prescribed by Congress, and, if it was in the power of Congress to delegate to the Executive Department authority to make and to enforce such a rule, the power can be granted to the Executive to increase or to lower at will, without any change in the statute and independently of Congressional action, the revenue to be derived from such a tax.

The foregoing considered, it is submitted that the arbitrary general rule of assessment prescribed and followed by the Commissioner of Internal Revenue was an unlawful attempt to exercise exclusively legislative power and for that reason (and because it was arbitrary and general) no assessment depending upon it could be lawful. Of course, the Treasury Department was without power to increase the scope of its own authority by calling its action in enforcing the general rule the exercise of the power to assess (*Waite* v. *Macy*, 246 U. S. 606, 608-9, and cases cited).

The undisputed effect of this rule was that there was no inquiry as to the actual or clear value of each interest at bar, or of any similar interest, but, in lieu of such inquiry, this interest, and every other interest of like character was "assessed" as though it had the actual or clear value which it would have had if it were (1) certain to produce an annual income for the use of the beneficiary precisely equal to four per cent of the fund by which it was to be earned (regardless of the nature of the investments or the conditions of the trust), (2) certain that this income would be enjoyed by the beneficiary during exactly the number of years indicated by the selected mortuary tables (regardless of the actual state of

health, the place of residence and the occupation of the beneficiary), (3) certain that the beneficiary would be permitted to dispose of or anticipate all or any part of the expected income (regardless of the laws controlling or any conditions or restrictions in the grant) and (4) certain that all or any part of the expected income could be discounted at the rate of four per cent per annum.

This rule is complete in itself and speaks for itself. By prescribing and promulgating it the Commissioner of Internal Revenue seems to have said, in substance and effect—

> I will make no inquiry concerning the facts which determine the actual and clear value of any particular "life interest" to which the legacy tax provisions of the Act of Congress of June 13, 1898, may be considered to apply, but I will arbitrarily assign to each and every such interest, for the purposes of the assessment I am required to make, a valuation equal to the arithmetical "present worth" of an annuity equal to four per cent of the principal of the fund, each future payment being discounted at four per cent per annum, and payable during a period of years equal to the average expectancy of life, as shown by mortuary tables which I have selected, of persons of the age of the beneficiary.

The rate of interest or discount for ascertaining the value of life estates and annuities for the imposition of the New York transfer or legacy tax was prescribed by statute at the death of John G. Moore at five per cent.

N. Y. Laws of 1896, ch. 908, sec. 230 (Appendix, p. 70).

And that rate has continued to be so fixed to the present time.

8 Birdseye C. & G., N. Y. Consol. L. 8553, 8554.

We find, therefore, that not only was four per cent, the rate adopted by the Commissioner of Internal Revenue, not the established rate in New York, but that another rate had been fixed for a like purpose, and that on the basis of this rate the valuation of the several interests involved in this case would have been materially lower, and the taxes correspondingly reduced, or, in one instance, entirely eliminated.

As stated in his own words, in a note appended to his table (R. 36), "This table is based on the 'actuaries' or combined experience table', money being worth 4 per cent per annum." By this one simple sentence, the Commissioner assumed and exercised the power to designate one from among many tables of mortality, and to determine what was in fact the worth of money.

The appellants have been unable to discover any foundation in the taxing statute or in any statute for the arbitrary general rule of "assessment" adopted by the Commissioner. Section 31 of the Act of June 13, 1898, and R. S. 3182 required the Commissioner of Internal Revenue to make the assessments, but no statute in terms or by necessary implication relieved him of the duty to ascertain "actual" and "clear values" by inquiry, no statute suggested that any fund should be assumed to earn income at the yearly rate of four per cent or any other rate, no statute suggested that the actual state of health or other conditions affecting the probability that a beneficiary would achieve the average length of life indicated by mortuary tables should be disregarded, and no statute suggested that a discount rate for future payments of four or any other per cent should be adopted. There is no reference in any Act of Congress in any way bearing upon this case to mortuary tables or to any percentage rate of income or discount.

Congress did not provide or attempt to provide this general rule of assessment, but if there was a lawful

assessment in the case at bar it apparently must be that all the following are true—

1. That Congress had power to prescribe this rule,

2. That power to prescribe it could be delegated to the Commissioner of Internal Revenue, and,

3. That such a delegation was effectively made either (*a*) expressly or (*b*) by implication.

It may be thought by some that Congress, itself, could not create an *ad valorem* excise and then prescribe a general rule of assessment which disregarded real values, as this rule disregards actual and clear value, for the reason that such a rule would be so frequently and seriously arbitrary and unequal in its operation as to be obnoxious to the fundamental law of the Constitution (*Knowlton* v. *Moore,* 178 U. S. 41; *Brushaber* v. *Union Pacific,* 240 U. S. 1). Such an argument is not necessary, however, in this case.

If Congress has power to make such a rule it is conceived to be so exclusively a legislative power that it could not be delegated.

All powers of Federal legislation are vested in the Congress of the United States, and, although other departments may be authorized to do many things which the Congress might do and the line separating legislative from administrative discretion is not easily drawn, those powers which are exclusively legislative in their character can never be exercised by any other agency.

Wayman v. *Southard,* 10 Wheat. 1, 41;
Field v. *Clark,* 143 U. S. 649;
Buttfield v. *Stranahan,* 192 U. S. 470;
Union Bridge Company v. *United States,* 204 U. S. 364;
St. Louis, Iron Mountain & Southern v. *Taylor,* 210 U. S. 281, 287;
United States v. *Grimaud,* 220 U. S. 506.

That the power to tax is in the strictest sense an exclusively legislative power is understood to be elementary.

> "This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only." *Rees* v. *Watertown,* 19 Wall. 107, 116; 22 L. ed. 72, 75.

See also—

Heine v. *Levee Commissioners,* 19 Wall. 655; 22 L. ed. 223, 226;

Merriwether v. *Garrett,* 102 U. S. 472; 26 L. ed. 197, 205-7;

Thompson v. *Allen Co.,* 115 U. S. 550, 554; 29 L. ed. 472, 474-5;

Spencer v. *Merchant,* 125 U. S. 345;

Cooley on Taxation, Third Edition, pp. 99-100.

There is no difficulty in distinguishing between the legislative power to prescribe the general conditions under which citizens shall contribute to the support of government, defining the nature of the tax, its subject matter, the rates to be applied, and formulating all general rules by which the amounts exacted shall be determined on the one hand, and the quasi-judicial power of assessment which is necessary to its application, on the other. This is particularly true of an essentially *ad valorem* tax where the principal element in assessment is the determination of the value to which the rates fixed by the legislature is to be applied.

Moreover, no assessing authority is ever permitted to adopt an arbitrary rule, or any general rule as to values, and apply such rule in lieu of making inquiry concerning the particular facts of each case.

McMillen v. *Anderson,* 95 U. S. 37, 43;

Glidden v. *Harrington,* 189 U. S. 255, 259;

Brooklyn City Railroad v. *State Board of Tax Commissioners,* 199 U. S. 48, 52;

Keeney v. *New York,* 222 U. S. 525, 535.

In the case at bar there was in respect of the interest of each daughter an uncertain income (the earnings of an unascertained fund), to be received during a still more uncertain period (the life of an individual), with a "present worth" controlled not only by these uncertainties but further complicated by local conditions affecting the discount rate. The extreme difficulty attending an effort to resolve all these elements in a determination of the "actual" or "clear" value, made by Section 29 the basis of the calculation of the amount of the tax, is undeniable. Here, then, was necessity for careful inquiry, earnest weighing of the several elements affecting value and, finally, for a conservative appraisement. But instead of an attempt to solve these difficulties, as they arose in particular cases, the Commissioner of Internal Revenue sought to evade them, for this and all similar cases, by proclaiming a general rule which he proceeded to apply, regardless of the facts, to every future right or payment and to every life interest. He made no exceptions, and enforced this general rule so rigorously that in the present case he based his pretended assessment upon annual incomes which it was not shown the trust funds could earn; upon the assumption that the trusts began to earn income for the beneficiaries on June 23, 1899, although there was no showing that they were productive from that date; and upon the discount rate of four per cent, although to discount the uncertain future payments at that rate would have been impossible, and, as will be shown, unlawful.

The suggestion that power exists to confer such authority upon executive officers is, when the character of the power is examined and its magnitude recognized, so revolting to those who have been bred to respect the essentials of constitutional liberty, that it must, apparently, be rejected as soon as stated. Either, however, Congress intended to delegate this authority to the Com-

missioner of Internal Revenue or did not intend to do so. If it intended to do so its effort was, as has been seen, to delegate a portion of its exclusively legislative power and therefore unconstitutional and of no effect; if it did not intend to delegate it, the Commissioner acted in violation of the form and purpose of the statute as well as in violation of the Constitution. In either case the pretended assessment was erroneous and illegal. There is, however, no word, line, clause or sentence in any Act of Congress to suggest that such a delegation was ever attempted or contemplated. No effort to show any express delegation has been made or will be made; if attempt is made to show a delegation by implication it will rest upon the shadowy and insufficient basis of the necessity for some assessment.

As said by Chief Justice Waite:

> "It is certainly true, that the commissioner of internal revenue cannot alone, or in connection with the secretary of the treasury, alter or amend the internal revenue law. All he can do is to carry into effect that which congress has enacted. His regulations in aid of the execution of the law must be reasonable, and made with a view to the due assessment and collection of the revenue."
>
> *Thacher* v. *U. S.*, 15 Blatchf. 15 (Fed. Cas. 13, 851); Affirmed, 103 U. S. 679.

> "The regulations of the department cannot have the effect of amending the law. They may aid in carrying the law as it exists into execution, but they cannot change its positive provisions."
>
> *U. S.* v. *200 Barrels of Whiskey*, 105 U. S. 571, 576.

The attempt of the Commissioner of Internal Revenue to substitute estimates controlled by the use of an arbitrary general rule for lawful inquiries concerning the

real or "clear" value of each particular interest falling within the scope of the taxing law was disclosed to the Supreme Court in *United States* v. *Fidelity Trust Company* (222 U. S. 158), as appears from the statement contained in the opinion in that case, but *its legality was not then before the Court and was not and could not have been passed upon*, as that suit did not involve the validity of a tax under the Act of June 13, 1898, but, solely, the question whether the interest of a certain legatee was a "contingent beneficial interest" within the intendment of Section 3 of the refunding Act of June 27, 1902 (32 Stat. 406). As the Court held that the interest taxed was not covered by the refunding act, it was of no consequence, in that case, whether it had been lawfully assessed or not.

The entire amount of the tax on the annuities and life estates was illegally and erroneously assessed and collected and can be recovered by the appellants.

The Act of June 13, 1898, proportioned the tax for which it provided to the "actual" and "clear" value of taxable legacies. The government contended below that these interests had the actual and clear value of the several assessments, but offered no evidence that this was a correct valuation, merely asserting that such is the estimate resulting from the application of the general rule adopted and used by the Commissioner. And, when that rule is analyzed, it appears that the result stated would not be accurate, as to the daughters, for instance, unless, among other things, the annual income of each from the legacy was $31,400.01, and she could dispose of and anticipate all expected income at a discount of four per cent per annum. Of the former of these conditions there was no proof. Of the latter condition, namely, that

the life beneficiaries could dispose of and anticipate their expected income at a discount of four per cent per annum, not only was there no proof, but the beneficiaries were specifically inhibited by statute from such disposal and anticipation.

The New York Personal Property Law (N. Y. Laws of 1897, ch. 417), in section 3 provided distinctly that "the right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be transferred by assignment or otherwise."

This section, as in force from 1897 to 1903, is quoted in full in the appendix to this brief (p. 69). The section was amended in 1903 (N. Y. Laws of 1903, ch. 87) and again in 1911 (N. Y. Laws of 1911, ch. 327), but only in details immaterial to the present case, and the language quoted above is still a part of the Personal Property Law, where it now appears in section 15.

5 Birdseye C. & G., N. Y. Consol. L. 6146, sec. 15.

In addition to this section of the Personal Property Law, the same rule was and is laid down by the Real Property Law.

The New York Real Property Law (N. Y. Laws of 1896, ch. 547), in section 83, provided that "the right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person cannot be transferred by assignment or otherwise." See the appendix of this brief (p. 70) for the section in full, as in effect from 1896 to 1903. The section was amended in 1903 (N. Y. Laws of 1903, ch. 88), but no change was made in the portion above quoted, and it continues in effect as section 103 of the Real Property Law.

7 Birdseye C. & G., N. Y. Consol. L. 7355, sec. 103.

This provision of the Real Property Law is made applicable by force of the statute itself to income arising from personal property.

Stringer v. *Young*, 191 N. Y. 157.
Lent v. *Howard*, 89 N. Y. 169, 182.
Graff v. *Bonnett*, 31 N. Y. 9.
Fowler Per. Prop. L. of N. Y. 52.

While the interdiction of the alienation by a beneficiary of his right to receive the income of a trust fund has been made in terms a part of the Personal Property Law only since 1897, the principle has been applied as to personal property as well as realty since the enactment of the Revised Statutes of 1830.

Fowler Per. Prop. L. of N. Y. 86.

This provision prevents a beneficiary of a trust of personal property from assigning or otherwise disposing of his right to the income thereunder.

Central Trust Co. v. *Gaffney*, 157 App. Div. 501, 506; affirmed on the opinion below, 215 N. Y. 740.
Garrett v. *Duclos*, 128 App. Div. 508.
Slater v. *Slater*, 114 App. Div. 160; affirmed without opinion, 188 N. Y. 633.
Seely v. *Fletcher*, 63 Misc. 448, 450.
Matter of Bishop, 89 Misc. 355, 362 (1915).

A trust to pay over income to a beneficiary is a trust to apply the income to the use of such person within the meaning of the statute.

Matter of Ungrich, 201 N. Y. 415, 419.

The alienation of a fixed annuity is forbidden, as well as the fluctuating income from a fund.

Cochrane v. *Scholl*, 140 N. Y. 516.

The object of the provision is to secure the beneficiary against the risks of business or improvidence.

Greer v. *Chester*, 62 Hun, 329; affirmed, 131 N. Y. 629.

It was the purpose of the legislature to make the interests of beneficiaries in the receipt of annuities or income arising from trust funds indestructible and absolutely inalienable during the existence of the trust, and it is beyond the power of the courts to authorize an assignment by which such interests will be destroyed.

Douglas v. *Cruger*, 80 N. Y. 15.
Lent v. *Howard*, 89 N. Y. 169.
Cuthbert v. *Chauvet*, 136 N. Y. 326.

It appears, therefore, that the interests, both of the daughters and of the annuitants, which were taxed by the Commissioner, *were in their very nature and essence inalienable, and that the beneficiaries were incapable of disposing of or anticipating such interests.*

This being the case, it is evident that the right of the beneficiaries to receive the income in question during their respective lives had no realizable, salable or market value—no actual or clear value, in the words of the statute—and that the taxes assessed thereon by the method described were erroneously and illegally assessed and collected, and should be refunded under the Act of 1912.

Aside from any question of statutory inhibition, it seems absurd to assert that even the certainty of possessing a particular sum of money at some particular future date has an actual or clear value equal to the sum which if presently possessed and placed at interest at current rates would produce the expected sum upon the date of its anticipated receipt. Whoever possesses (say) $50,000 to-day may place it at interest and a year from to-day have $51,750 (assuming a rate of interest of three and one-half per cent per annum), but he may

also, if he has the capacity, invest it in some business and double, treble or quadruple it within an even shorter period, or he may use it to satisfy immediate necessities or desires. It is unreasonable to deny value to these options. But the pretended assessment in this case, and in all similar cases under the arbitrary general rule adopted by the Commissioner, not only denied value to them but it assumed certainty where certainty did not at all exist; where every element was fraught with the utmost uncertainty. The life beneficiaries had, at the most, *only a calculable chance* of receiving the income on which the Commissioner based his "assessment". And this was a tax which the statute creating it declared should be laid upon "clear value" and "actual value" and deducted from the legacy or distributive share on account of which it was exacted.

"Present worths", amounting as they do to "somewhat speculative valuations" (*Manufacturers Railway* v. *United States*, 246 U. S. 457, 494), ought not to be considered proper bases for taxation, especially when the law says "clear" and "actual" values are to be the basis (*Lynch* v. *Union Trust Company*, 164 Fed. 161, 167. See passage quoted, page 46 of this brief).

As said by the Supreme Court of Illinois in *Billings* v. *People*, 189 Ill. 472, 487 (affirmed, 188 U. S. 97), and quoted by this court in *Vanderbilt* v. *Eidman*, 196 U. S. 480, at page 496:

> "The tax imposed by section 1 of our statute is fixed upon the 'clear market value of the property received by each person' at the prescribed rate, that is, as shown by the context, the clear market value of the beneficial interest so received. Surely, by such language it was not intended by the legislature that the courts should undertake to ascertain the clear market value of a mere possible interest which, from its very nature, could not have any market value, and which, for all practical purposes, such as taxation, is incapable of valuation."

It would seem to be plain that a right to receive income, which cannot be assigned or disposed of, and which may cease at any moment, has not an actual or clear value to be measured by discounting successive uncertain and problematical payments.

Where an erroneous rate of assessment has been adopted by the Commissioner, the assessment may be set aside as a whole.

U. S. v. *Rindskopf,* 105 U. S. 418, 422.

The law sanctioned no tax that could not be deducted from something immediately payable. Although the clause providing that in every case the tax should be deducted from the particular legacy or distributive share on account of which it was paid, was added to Section 30 by amendment of March 2, 1901, this Court has declared that the same meaning was conveyed by Section 29, as originally enacted.

> "These provisions harmonize with the meaning which we have ascribed to Section 29, since they clearly import that the tax is to be deducted from a beneficial interest which the beneficiary was entitled to enjoy, and from which, before payment or distribution, a deduction of the duty was to be made." *Vanderbilt* v. *Eidman,* 196 U. S. 480, 494.
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> See also *Knowlton* v. *Moore,* 178 U. S. 41, 66-7.

No one had a right to diminish the amount of the remainders limited on the daughters' life estates in order to use the amount subtracted therefrom to pay the taxes on the life estates. It necessarily follows that whatever tax could lawfully have been assessed must have been such as could be deducted from the income of the trust fund. But the trust funds of the daughters existed only to a limited extent even on July 1, 1902, and they could earn no income until they were established. The pretended assessment of a tax in April, 1901, antedated the existence of any fund from which the tax could be de-

ducted, and for that reason, if there were no other, could not have been a lawful assessment. Moreover, it is evident, that the fund from which the tax must be deducted is, by that fact, indicated unmistakably as the fund to which the liability for the tax must attach, whenever such liability exists. The validity of this reasoning is sustained by consideration of the consequences which must follow the only other conclusion that is possible, namely, that, although it must be deducted from the income, the tax was intended to be calculated with reference to the principal of such a fund. The annuitants had reached ages, at the death of their testator, at which their expectancy of life, as estimated in mortuary tables, was not great and the estimated value of their life interests was correspondingly reduced. No rule, however, could properly be applied to their interests which would not be practicable in the case of the daughters, who were young women and whose life interests were valued at a high figure. A proposed construction of a taxing statute that could not be applied to all conditions that would probably arise must give way to one capable of general application. Consider, for example, the case of a testator who provides a trust fund of $125,000 for an adopted son of the age of ten years, such child to receive the income during life, with remainder to another. The application to such an interest of the formula provided in the arbitrary general rule of assessment adopted by the Commissioner, would have resulted in a tax of $7,295.10, which, even if the fund produced four per cent, would exceed the first year's income by $2,295.10. Or take the supposed case of a fund of $2,000,000 left in trust in the same manner, to a stranger in blood aged twenty years, with remainder over. The Commissioner's method would have "valued" the life interest at $1,476,030.40 and "assessed" a tax thereon of $221,404.56. Under the conditions which prevailed in 1899 such a fund could scarcely have produced as much as three and one-half per cent or $70,000 per

year, but if it had produced four per cent or $80,000, the beneficiary would have had to go for nearly three years without any income whatever in order to pay the tax out of the income.

The beneficiaries in this case might have found themselves unable to raise funds to pay this tax, or any of the legatees in any of the assumed cases might have concluded that it was not worth while to wager the present amount demanded as a tax against the contingency of receiving a larger aggregate of future income. Such a legatee might consider the odds provided in the arbitrary general rule of assessment to be incommensurate with the chances actually against him. The renunciation of a legacy under such conditions, during the time that the tax was in force, would have caused the fund to pass immediately to the person or corporation ultimately entitled. If such passing was not taxed under the statute, the fund would pass undiminished, or, if such passing were taxable, the Government would be entitled to a tax of an entirely different and usually a much larger amount. These considerations indicate the insuperable difficulties which must attend any effort to find in the "present worth" of a life interest in the income of a fund any "actual" or "clear" value, taxable under the Act of June 13, 1898, in excess of the income actually paid to the legatee or at any time other than the actual time of such payment.

Persuasive, also, is the fact that no more income is certain than that which is actually paid to or actually accrues to the use or benefit of the life tenant. If the "present worth" of such an interest, calculated by the use of mortuary tables, were to be taken as the basis of taxation it is evident that the same fund might be successively taxed in the hands of successive beneficiaries, each paying more for the privilege of succession than he obtained as income from the fund. Thus, in Vanderbilt's case (196 U. S. 480), as fully set forth in the opinion of

the Supreme Court, there were four named beneficiaries, two sons and two daughters, whose rights in the trust fund were to succeed in the order of their ages (except as to the daughters, who were to take equally), and in case of the death of all of them before the trust determined the decedent would have been intestate as to his residuary estate—presumably it would have passed under the intestate laws to his widow. The ages of these four children were not stated in the opinion, but Alfred G. was twenty-two at his father's death, and, for the purposes of the example, it will be assumed that the ages of the others were 20, 18, and 16, respectively. Now, suppose the fund had been put in trust for the life of whomever of these should eventually survive, and the rights to income only bequeathed, the eldest to take first, on his death the next eldest, and so on. Then suppose Alfred G. had paid the tax on the estimated present worth of his rights to receive income during his full "expectancy of life", and then died; then the next beneficiary had so paid and died, and so on, all finally dying, and the whole residuary personal estate passing to the widow. A simple calculation, using the figures contained in the mortuary tables and the "present worth" tables for annuities promulgated by the Commissioner of Internal Revenue, shows that the taxes demanded and collected on the Government's present theory would have been—

On account of Alfred G. Vanderbilt's rights	$310,834.32
On account of Reginald C. Vanderbilt's rights	315,038.50
On account of Gertrude Vanderbilt's rights	318,971.19
On account of Gladys Moore Vanderbilt's rights	322,642.13
Total collected	$1,267,486.14

The amount of the residuary estate was $18,972,-117.46; if it produced four per cent the yearly income was

$758,884.70, and it was taxed on that assumption. So if the above rights had been taxed in the way suggested and had all determined within a year, the widow's exempt share would have been depleted by the difference between $1,267,486.14 and $758,884.70 or $508,601.34. This is the *reductio ad absurdum* of the Government's theory. Will counsel for the Government say that the deaths could not have occurred so closely together and in such succession? Or will he assert that if they had, the theory he supports would not have worked out in the way indicated?

Such interests as those under discussion, including the interests presented by the case at bar, are not "contingent" within the terms of the Act of June 27, 1902. On the contrary, they are present entities in the enjoyment of the life tenant (*United States* v. *Fidelity Trust Company*, 222 U. S. 158, 160). Recognition of this principle is, however, in no way inconsistent with confidence that Congress never intended to tax such interests, save as taxable sums from time to time accrued to the use or benefit of the life tenants. To conclude otherwise would be to conclude that Congress "expressly commanded that to be done which it was impossible should be done", namely, the deduction of the amount of the tax from a sum smaller than the tax. Such a possibility has heretofore been assigned as a reason for a different construction.

> "In other words, the act expressly commanded that to be done which it was impossible should be done compatibly with any hypothesis that the tax was on the whole personal estate, for, as we have seen, under that assumption the deduction of the tax from the whole estate was essential." *Knowlton* v. *Moore*, 178 U. S. 41, 69; 44 L. ed. 969, 981.

If it was the intention of the Act of 1898 to tax future interests (which we deny), it is clear that no machinery or standards were provided for the purpose, and that a tax on such interests could not lawfully be assessed or collected.

As has already been pointed out in this brief, the requirement of the Act of 1898 that only "clear values" and "actual values" of legacies should be taxed, is incompatible with the assessment of a tax on annuities and life estates by the use of mortuary tables on the chance that such interests would continue for the several terms exhibited by the tables. A study of the historical development of the act, illuminated by judicial comments, leads strongly to the conclusion that it was not the intention of Congress that the right to receive future payments of annuities and the income of life estates should be taxed at all.

The history of the legacy tax law of 1898 is traced in the opinion of the present Chief Justice in the case of *Knowlton* v. *Moore,* 178 U. S. 41, at pages 48-52, 68 and 69. From this and from an examination of the statutes considered, it appears that the act of 1898 was copied, with certain changes, from the act of Congress of 1864, which was a revision of the act of Congress of 1862, which was based on the English act of 1796. We will therefore start with the English legislation on the subject, and trace down from the source certain principles which are important in the present connection.

The legacy tax was first imposed in England in 1780 by the 20 Geo. III., c. 28. It was originally nothing but a stamp tax on the receipt given to the executor or administrator by the legatee or next of kin. The legacy tax was imposed as a duty on the property passing to the legatee

or next of kin in 1796 by 36 Geo. III., 52, and continues to be in effect.

Hanson, Death Duties, 29. See also *Ib.*, 46, for a table showing the various amendments of the legacy tax laws.

The Legacy Duty Act of 1796 (36 Geo. III, c. 52) imposed a tax on legacies, graduated according to the relationship of the legatee. It was specific in subjecting to the tax legacies given by way of annuity (sec. 7), and it provided that such legacies, whether for life or years, *should be charged according to the tables in the schedule thereunto annexed* (sec. 8). The tax on such legacies was to be divided into four parts, payable annually for four years, and if the annuity ceased by the death of the annuitant before the completion of the payments, the remaining payments were to be excused. Sections 2, 7 and 8 of this act are printed in full in the appendix to this brief (p. 59). Sections 9 and 10 provided in like manner for the ascertainment of the value of annuities charged on legacies or to be purchased from legacies, and of the legacies so made subject to charge, and sections 12 and 13 for legacies enjoyed by different persons in succession (Hanson on Death Duties, 575-579). In subsequent sections the theory of the tax and the machinery for administering it were worked out in great elaboration, and at the end were placed three tables, occupying thirty-three pages, showing the values of an annuity of £100 per annum, respectively, if held on a single life, if held on the joint continuance of two lives, and if held for a term of years. These tables are not printed in Hanson on Death Duties, and for them the original English Statutes at Large should be consulted (36 Geo. III, c. 52). At age 21 the value of an annuity of £100 for life was fixed at £1,591 4s. Under the Commissioner's tables used in the present case, the value of such an annuity passing to

Faith Moore, who was 21 years of age, was fixed much higher, namely, at £1,832.932 (R. 8).

The Succession Duty Act of 1853 (16 and 17 Vict., c. 51; Hanson, Death Duties, 773) imposed certain taxes, graduated in a similar manner, on the succession to real property (and also, in some cases, personal property), and provided that the value of an annuity or interest for life or years for the purpose of taxation either under this act or the Legacy Duty Act, *should be calculated according to the tables in the schedule annexed to the act.* Sections 2, 21 and 31 of the act are quoted in the appendix to this brief (p. 62). The act was concluded by a table giving the values of an annuity of £100 held on a single life. The present worth at each age in this table is considerably greater than the corresponding figure in the act of 1796, but still much less than the values shown by the Commissioner's tables used in the present case. At age 21 the value fixed was £1,719 17s.

Congress followed the English act of 1780 by imposing in 1797 a legacy tax collected through the medium of a stamp upon the receipt given to the executor (1 U. S. Stats. 527). This act was repealed in 1802 (2 U. S. Stats. 148).

Knowlton v. *Moore,* 178 U. S. 41, 50.

In 1862, in the search for sources of war revenues, Congress again turned to English precedents. In that year an internal revenue act was passed containing two sections imposing taxes on legacies and distributive shares (12 U. S. Stats. 485, secs. 111 and 112) for which the English act obviously served as a prototype. Both acts imposed taxes upon legacies after the same general theory, and the method of fixing the rate with reference to the degree of relationship was not merely similar, but to a very considerable extent the classification was expressed in words absolutely identical. There was, how-

ever, this important difference between the two acts. The English act was an act specifically imposing a tax not only on legacies in possession, but also on annuities, life estates and estates for years, providing distinctly how they should be valued, and incorporating in the act elaborate schedules showing the basis of valuation for each age or term. The American act was an act in terms taxing only the clear or actual values of interests in possession, without any language showing an intention to tax the theoretical present worth of interests in expectancy, and without any means of ascertaining the value of such interests if they were intended to be taxed. Passing this point for the present, we will follow down further the history of this class of legislation.

In 1864 Congress passed an internal revenue act, sections 124 and 125 of which (13 U. S. Stats. 285) re-enacted sections 111 and 112 of the act of 1862 in an amended form. The rates were raised, some verbal corrections were made, and certain administrative provisions were inserted. There was, however, no substantial change in the theory of the tax.

By sections 126 to 150, inclusive, of the same act of 1864 (13 U. S. Stats. 287), a tax was imposed upon the succession to real property. The act was modeled upon the English succession duty act of 1853 (*Knowlton* v. *Moore*, 178 U. S. 41, 52, 68). To a very considerable extent the English act was followed *verbatim*, and in general only sufficient changes were made to meet local conditions and to restrict the act to the taxation of successions to real property, the English act having covered also, to a certain extent, personal property. The succession tax sections, unlike the legacy tax sections, were made to apply where any person became beneficially entitled, "in possession or expectancy, to any real estate or the income thereof" (sec. 127). The American act did not contain a schedule fixing the values of annuities or life interests, but provided, by section 144, that the duty on a succession

in expectancy might be commuted by the assessment of a present value, regard being had to the contingencies affecting the liability, and interest being reckoned at the rate for the time being allowed by the Commissioner in respect of duties paid in advance. (See appendix, p. 64.)

The internal revenue act of 1866, besides certain amendments to the succession tax law, which it is not necessary to consider, contained several amendments (14 Stat. 140) to sections 124 and 125 (the legacy tax sections) of the act of 1864. These amendments are quoted in full in this brief, appendix, page 64. As pointed out in *Knowlton* v. *Moore*, at page 69, the amendments of 1864 were overlooked by the draftsman of the act of 1898, and were not carried into that act. Their bearing will be considered under the act of 1901, *infra*.

Having served their purpose as war measures, both legacy and succession taxes were repealed by section 3 of the internal revenue act of 1870 (16 U. S. Stats. 256, 257).

The legacy and succession tax laws of the civil war period were considered in several cases in the Supreme Court.

The first case to be heard in this court under these laws was *Scholey* v. *Rew*, 23 Wall. 331, decided in 1874. In this case the validity of the succession tax was sustained. No question arose as to the taxation of estates in expectancy.

In the next case, *Clapp* v. *Mason*, 94 U. S. 589, the court held that a remainder in real property which vested in possession subsequent to 1870 was not subject to the succession tax.

The case of *Mason* v. *Sargent*, 104 U. S. 689, related to the legacy tax upon the remainder in the personal property of the same estate. The ruling was the same as in the case of the succession tax. In both these cases the precedent life estate was that of the widow, and hence exempt from taxation. .

In *Wright* v. *Blakeslee*, 104 U. S. 689, the court held that the vesting in possession during the operation of the succession tax law of a remainder created by will prior to such time was subject to the succession tax.

In *Sturges* v. *U. S.*, 117 U. S. 363, the court held that a legacy bequeathed while the legacy tax law was in effect, but not to be paid until the legatee should attain the age of twenty-one, which took place after the repeal of the law, was not taxable. It would appear from the opinion that the tax was not assessed until after the legacy became payable.

In none of these cases was the value of an expectant or limited estate fixed by the use of mortuary tables, or was there any expression sustaining such a method. We have also looked in vain for any decision of the lower Federal courts holding that mortuary tables might be employed for the purpose of assessing a legacy tax under the civil war acts. We have not even been able to find any reported case where mortuary tables were shown to have been so used. In one case, *U. S.* v. *N. Y. Life Insurance & Trust Co.*, 9 Ben. 413, Fed. Cas. 15,873, the court rejected the government's claim for a tax on the value of an annuity for years, based on the Northampton tables, because such tax was held to have been already paid. The tax paid was assessed on certain life estates, but there is nothing in the report to show that it was assessed by the use of mortuary tables, and the court did not pass upon the validity of the assessment. No doubt the value of estates in expectancy in real property may have been fixed for the imposition of the succession tax by the application of section 144 of the act of 1864, whereby on the taxpayer's petition the tax might be commuted, "regard being had to the contingencies affecting the liability", and the rate of discount being fixed by reference to the rate allowed in the case of taxes paid in advance. We can find no evidence, however, in the reports that the use of mortuary tables

was either sanctioned by the statutes or approved by the courts, for the purpose of assessing a legacy tax under the acts of 1862, 1864 or 1866.

Once more, when the expenses of the Spanish war had to be hurriedly provided for, the national legislature resorted to the time-honored expedient of copying existing legislation. There was no attempt made to revive the succession tax on real estate, but the provisions of the act of 1864 as to the legacy tax were transferred bodily to the war revenue act of 1898. In speaking of this act in *Knowlton* v. *Moore,* at page 69, the present Chief Justice said:

> "That the provisions of the act of 1864 were in mind when the present act was drafted is apparent, since it is not disputed that the act under review, so far as the tax on legacies and distributive shares is concerned, is an exact reproduction of the original act of 1864, except to the extent that the present act contains provisions relating to a progressive increase of rates. We say of the original act, because the present act does not contain in it the amendments to which we have referred, made in 1866; the fair inference being that the writer of the present act had before him the original text of the act of 1864, and not that text as amended by the act of 1866."

And again, in the case of *Vanderbilt* v. *Eidman,* 196 U. S. 480, at page 501, the present Chief Justice said:

> "Thus, by legislative action and judicial interpretation, it came to pass that the acts of 1862 and 1864 signified exactly what we now construe the act of 1898 to mean."

In 1901 Congress reenacted sections 29 and 30 of the act of 1898 in an amended form (31 Stat. 946). The two amendments of section 29 related to the exemption of charitable, etc., corporations, and to the defining of the time when the act took effect. Section thirty was

amended by inserting a brief reference to estates of non-residents, and by three other insertions, all of the latter suggested by the amendments of 1866. The amendments of 1866 which we have numbered (2) and (3) in the appendix (p. 64), were inserted bodily and literally, with only such slight changes as transmuting assessors into collectors, and referring to the appropriate section numbers. Congress dealt entirely differently, however, with the amendment of 1866 which we have numbered (1). This amendment, as passed in 1866, made the tax due and payable whenever the party interested in the legacy should become entitled "*to the possession or enjoyment thereof, or to the beneficial interest in the profits accruing therefrom*". The revisers of 1901 changed it to read, "shall be due and payable in one year after the death of the testator". In other words, the revisers having the amendment of 1866 before them, considered whether they would make the act of 1898 applicable to the taxation of beneficial interests in the income accruing from legacies, and the tax payable upon the vesting of such a beneficial interest, and concluded to do neither. Instead, they left the act applicable only to the clear and actual values of legacies, and made the tax payable on such legacies one year after the death of the testator. As was held in the case of *Vanderbilt* v. *Eidman*, 196 U. S. 480, at page 498, the act of 1901 did not enlarge the act of 1898 so as to cause that act to embrace subjects of taxation which were not previously included.

The act of 1901 was passed March 2, 1901, and went into effect July 1, 1901. The act is not directly applicable in this case, since the testator died and the tax was paid before it became operative. Reference is made to the act, however, because it shows a deliberate purpose to reject the only provision of the Federal legacy tax laws which ever definitely imposed a tax on an expectant right to receive income—a provision which may have been omitted from the act of 1898 by inadvertence, but which was

certainly omitted from the act of 1901 designedly and advisedly.

Looking back, now, over our summary of legacy tax legislation we find that Congress adopted and carried into the act of 1862 the general principles, and in some instances, the exact wording of the English act of 1796, but with this important and vital distinction, that it struck out all reference to the imposition of taxes on annuities and life estates and to the use of mortuary tables, and eliminated such tables from the act. Not only this, but it specified that the taxable property must exceed a certain amount in "actual value", and that the taxes should be assessed upon the "clear value" of the interest taxed.

Moreover, we find that while Congress amended the internal revenue act in 1864 by imposing a succession tax on estates in realty in possession or expectancy and the income thereof, and provided a means for assessing the present worth of such interests, and while in the same act it amended the legacy tax law, it did not see fit to make like provision as to the assessment of a tax on expectant interests in personalty.

We further find that when Congress once more had the legacy tax law under consideration in 1898, it again made no provision for the assessment of a tax on such interests, and followed this up in 1901 by rejecting the provision of the act of 1866 which had this end in view.

To sum up, then, we find that while the attention of Congress was called to the appropriate method of imposing and providing for the assessment of a tax on expectant interests in personalty by the English legacy duty act which it adapted, and while it provided such method for the succession tax on realty, it not only made no such provision as to the legacy tax on personalty, but inserted language negativing the taxability of future interests by limiting the subjects of taxation to such as had clear and actual value. Moreover, it adhered to this policy during

the several amendments of nearly forty years, and in this respect left the act of 1898, and even the act of 1901, just as it first enacted the act of 1862.

Since we find this important and fundamental divergence from the theory of the English legacy duty act, not only in the first enactment on the subject, but persisted in throughout the whole chain of subsequent legislation, we must infer that it was deliberate and intended, and draw the conclusion that annuities and life estates were not meant to be taxed by the use of mortuary tables. If they had been, Congress would have provided a table for valuing them, as did the English parliament, or would have fixed a rate of discount and designated a certain known table of life expectancies, as have the various states which have imposed taxes on such inheritances.

We submit, accordingly, that the act of 1898 provided no means for the assessment of a legacy tax on the present worth of life annuities and interests by the use of mortuary tables.

A statute may impose a tax on certain interests, and yet the tax may be uncollectable because no method is provided for assessing such interests or measuring the tax. In New York, by the act of 1885 (N. Y. Laws of 1885, ch. 483), a tax was imposed on collateral inheritances, and the surrogate was directed to assess "the then cash value of all estates, annuities and life estates," etc. (sec. 13). No direction was given, however, as to how the value of life estates and other uncertain interests was to be ascertained. Mrs. A. T. Stewart died while this act was in force, and some years later a tax was assessed on a legacy which had vested through the exercise of a power of appointment conferred by her will. In considering and affirming this tax the Court of Appeals said:

> "The claim of the appointees under the power must be allowed if the statute provides no scheme for the taxation of contingent and uncertain in-

> terests, although such interests may be within the purview of the first section. It is not enough for the legislature to declare that such interests are taxable. If no mode is provided for assessing and collecting the tax the law is imperfect and cannot, as to such interests, be executed."
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> *Matter of Stewart,* 131 N. Y. 274, 284.

In 1887 the law was amended (N. Y. Laws of 1887, ch. 713) by providing distinctly for the taxation of life estates or estates determinable upon a contingent event, and remainders (sec. 2), and by inserting the following (sec. 13):

> "And the value of every future or contingent or limited estate, income or interest shall, for the purposes of this act, be determined by the rule method and stardards of mortality and of value, which are employed by the superintendent of the insurance department in ascertaining the value of policies of life insurance and annuities, for the determination of the liabilities of life insurance companies, save that the rate of interest to be assessed in computing the present value of all future interests and contingencies shall be five per cent per annum."

It will be seen that this act prescribed the method of assessment, designated the mortality tables which were to be used, and fixed the rate of discount at five per cent, thus settling the question for New York, as it should have been settled also by the Federal statutes.

Under the statutes of many of the States, an inheritance tax is imposed on the present worth of life interests, ascertained by the use of mortuary tables, but we doubt whether any instance can be found where such a tax is enforced, except by virtue of clear and specific statutory provisions subjecting such interests to tax, designating the mortuary tables to be employed for the purpose and fixing the rate of discount.

Mortuary tables appear to have been availed of in numerous instances under the act of 1898, pursuant to the Commissioner's rule, but we doubt whether any reported case can be found where the courts sustained their use against direct attack. On the contrary, there were various decisions to the effect that the ascertainment of the value of life interests by mortuary tables was improper.

> "It may be added, however, that the method of calculation adopted by the collector was also objectionable because . . . the value of the residuary estate bequeathed to the sons was *estimated by the use of mortuary tables, for which use we fail to find any authority in the statute.* Still further, if the use of mortuary tables were permissible in the proper case, they should not have been used here, for one of the contingencies contemplated by the will was the remarriage of the widow, and, while the probability of death may perhaps be approximately estimated from the recorded experience of insurance companies, there are as yet no statistics available from which the probability of remarriage may even be conjectured." *Herold* v. *Shanley,* 146 Fed. 20, 24 (C. C. A., 3rd Cir.).
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> "To create the *corpus* of a legacy, the income of which will supply these definite quarterly payments, would impose upon the trustees the necessity of setting apart such an amount of money as would, in their judgment, produce the income, thus creating a principal sum or *corpus* which the testator has not seen fit to create in the shape of a legacy, and to so create it by the mere exercise of a judgment which may prove mistaken in its results. *The sum thus arbitrarily estimated,* the collector assumes the right of appraising as the legacy of a life estate in personal property, the *present value* of which, for the purposes of taxation, *is to be ascertained by rules and methods not designated in the taxing law, nor, as we think, authorized or contemplated thereby."* *Disston* vs. *McClain,* 147 Fed. 114, 117-118 (C. C. A., 3rd Cir.).

"In this statute, there is no mode provided for valuing such an income given to a person for life. The mode adopted by the collector in this case is entirely unauthorized by the statute, for he did not estimate by life tables the value of a life estate in a designated and ascertained fund, but by an exercise of his arbitrary judgment, proceeded to ascertain or create the fund that would produce the income, though it had not been ascertained or designated by the testator, and then *proceeded to value it by the use of life tables.* The provision in section 30 of the act of 1898, relied upon by the collector as an authorization of the procedure adopted by him, is not, in our opinion, clear and precise enough to sanction it." *Disston* vs. *McClain,* 147 Fed. 114, 122-123.

"No question is made in this respect, and it is therefore assumed that Mrs. Wertheim, under this provision of her father's will, had a beneficial life interest in the *corpus* of the fund or estate, the income of which she was to enjoy during her life. . . . No method of assessing the value of such a life interest is prescribed by the statute of 1898." *Herold* v. *Kahn,* 159 Fed. 608, 613-614 (C. C. A. 3rd Cir.).

"It was necessary for the collector, therefore, . . . to . . . resort, not only to the use of life or mortality tables, but to employ an arbitrarily assumed rate of interest in making the computation. We are entirely satisfied that, whether the employment of mortality or life tables under any circumstances is contemplated by the act, the mode resorted to in this case was not such as to produce the 'actual' or 'clear' value therein specified. In using those terms Congress must be deemed to have meant something more definite and certain than would be attached to the bald term 'value', without the qualifying adjectives. A thing may have value in a general sense, although that value may not be susceptible of ready or definite ascertainment. It may depend upon some uncertainty or contingency. So that, when Congress employed the expressions 'actual value' and 'clear

> value' it very evidently intended to convey the idea of definite or certain value—something in no sense speculative. Here it is at once apparent that the result reached as a basis for the tax through the method adopted was at most an approximation or merely speculative; and it could be nothing else. Life or annuity tables are never employed to ascertain definite or actual results, but as guides to a reasonable approximation. *Vicksburg, etc., R. R. Co.* vs. *Putnam*, 118 U. S. 545, and cases there cited." *Lynch* vs. *Union Trust Company*, 164 Fed. 161, 167 (C. C. A., 9th Cir.).

In all of these cases the proposition was involved that the tax paid on the value of the life estate, in excess of the income actually received in possession and enjoyment, was a tax exacted on a contingent beneficial interest, and hence was recoverable under the act of 1902. On that proposition the courts were overruled by the case of *United States* v. *Fidelity Trust Co.*, 222 U. S. 158. On the proposition that the use of mortuary tables was improper, there has as yet been no ruling by this court. The case of *Rand* v. *U. S.*, 249 U. S. 543, raised the issue, but that case was disposed of on a preliminary objection without reaching the main question.

As previously noted, the *Fidelity Trust Company* case is not in any way opposed to our contentions. That case arose under the laws of Pennsylvania, which, unlike the laws of New York, interposed no obstacle to the anticipation or alienation of the interest of the life beneficiary. Moreover, the suit was brought under the act of 1902, and it was held that under that act the tax paid on life estates was not recoverable as a contingent beneficial interest. The case was argued and decided in this court in 1911, and hence of course prior to the passage of the act of 1912. The present suit is brought (in so far as the branch of the case now under discussion is concerned) under the act of 1912, for the recovery of taxes erroneously or illegally assessed or collected. The fact that these taxes were or

were not paid on contingent beneficial interests is immaterial. It is the fact that these taxes were erroneously and illegally assessed and collected, as we believe we have abundantly shown, which gives us our right of recovery.

The *Fidelity Trust Company* case was cited in the case of *Henry* v. *United States*, decided at this term (Feb. 2, 1920), but in the *Henry* case no question was raised as to the legality of the use of mortuary tables, and we do not understand the court to have there passed upon that proposition.

Second Specification of Errors.

The court below erred in dismissing the appellants' petition as to the taxes assessed upon the life interests of the two daughters in the residuary estate, in excess of the taxes payable upon their life interests in the amount of the trust funds turned over to the Atlantic Trust Company prior to July 1, 1902, which said excess taxes, amounting to $12,035.51, were assessed on interests in the residuary estate which were unadministered and still subject to the payment of debts and expenses, and hence were contingent beneficial interests which had not become absolutely vested in possession or enjoyment prior to the last named date.

All of the taxes covered by this specification were assessed by the use of mortuary tables, and, as we claim, should be refunded with the other like taxes under the theory urged under the first specification. If not so refunded, then we claim their refund under the theory that on July 1, 1902, the administration of the estate by the

Executors was incomplete and unfinished, and except as to the funds of the value of $426,086.66 for the benefit of Ruth Moore Lee, and a like amount for the benefit of Faith Moore, which had then vested in the Atlantic Trust Company as Trustee of the residuary estate, the interests of the daughters remained entirely contingent and indeterminate, since under the New York Code of Civil Procedure and the law of the State as established by judicial decisions, all the assets of the testator's estate continued to be subject to the payment of claims of creditors of the estate, notwithstanding the publication of the notice to creditors, so long as such assets should remain in the hands of the appellants as executors.

The cases of *United States* v. *Jones,* 236 U. S. 106, and *McCoach* v. *Pratt,* 236 U. S. 562, are the principal authorities on this branch of the case.

In the case of *United States* v. *Jones,* 236 U. S. 106, at page 112, the court said:

> "It hardly needs statement that personal property does not pass directly from a decedent to legatees or distributees, but goes primarily to the executor or administrator, who is to apply it, so far as may be necessary, in paying debts of the deceased and expenses of administration, and is then to pass the residue, if any, to legatees or distributees. If the estate proves insolvent nothing is to pass to them. So, in a practical sense their interests are contingent and uncertain until, in due course of administration, it is ascertained that a surplus remains after the debts and expenses are paid. Until that is done, it properly cannot be said that legatees or distributees are certainly entitled to receive or enjoy any part of the property. The only right which can be said to vest in them at the time of the death is a right to demand and receive at some time in the future whatever may remain after paying the debts and expenses. But that this right was not intended to be taxed before there was an ascertained surplus or residue to which it could

> attach is inferable from the taxing act as a whole and especially from the provision, whereby the rate of tax was made to depend upon the value of the legacy or distributive share."

In the case of *McCoach* v. *Pratt*, 236 U. S. 562, at page 567, the court, referring to the Jones case, said:

> "The intestate had died before July 1, 1902, but the time for presenting claims against the estate had not expired prior to that date, and therefore what, if any, surplus would remain was still uncertain and the heirs were not as yet entitled to a distribution. It was accordingly held that the distributive shares did not become 'absolutely vested in possession or enjoyment' before July 1, 1902, but remained contingent in the sense of the statute, and consequently that the tax should be refunded. The present case differs from that only in the fact that here the tax was collected upon legacies. This difference is not material. The refunding act deals with both in the same way, and the local law subordinates the rights of legatees to those of creditors in like manner as it does the rights of distributees."

Under section 2718 of the New York Code provision was made for the publication by executors of a notice to creditors. The section further provided that if a suit should be brought on a claim which was not presented within six months from the first publication of the notice, the executor should not be chargeable for any assets or moneys that he might have paid in satisfaction of any lawful claims (see Appendix, p. 71, for this section and other cognate sections).

The effect of these provisions of statutory law is well settled in the courts of the State.

> "Neither the provisions of the Revised Statutes nor those of the Code of Civil Procedure, by which the former have to some extent been superseded, make it the duty of a creditor to submit his claims

to the executor or administrator in pursuance of the notice requiring presentation of demands against his decedent's estate. If a creditor chooses to present his claim and it is rejected, he must, unless it is referred, commence an action thereon within six months, or absolutely forfeit his right of recovery. But if he does not choose to present his claim at all he may, nevertheless, seek his remedy by action at any time before it is barred by the Statute of Limitations, though in that event he can have no costs, and can ordinarily recover from the executor or administrator only such sum as was in his hands applicable to the claim at the commencement of the action."

Greene v. *Day*, 1 Demarest (N. Y.) 45, 51. Per Rollins, Surrogate, in Surrogate's Court of New York County.

"The only effect of omitting to present to an executor or administrator, a claim against his testator or intestate, within the six months prescribed by art. 34 of 2 R. S., p. 88, is to limit the recovery in a suit subsequently brought by such a creditor, to the amount of such assets as may be in the hands of the administrator or executor at the time such suit is commenced, and to deprive him of all right to recover costs. (2 R. S. 89, secs. 39, 40, and 41.)"

Baggott v. *Boulger*, 2 Duer (N. Y.) 160, 169.

(The sections of the Revised Statutes referred to in this case were carried in substance into section 2718 of the Code.)

The following cases are to the same effect:

Erwin v. *Loper*, 43 N. Y. 521.

Cotter v. *Quinlan*, 2 Demarest (N. Y.) 29, 33.

And the law is so stated in the last edition (1916) of *Jessup & Redfield on Surrogate's Practice*, 971.

It appears, therefore, that though the Executors had

published a notice to creditors for six months in 1900, this did not bar claims which were not presented before the termination of the time limited, but that creditors might have thereafter presented claims and asserted them against any assets still remaining in the hands of the executors. The effect of the publication of such a notice was to free the Executors from personal liability for any assets turned over by them to the residuary legatees in the absence of duly presented claims, but the assets retained in their hands continued liable for all debts of the testator and could be subjected to the payment of claims presented at any time, provided the statute of limitations should not have run.

On July 1, 1902, the Executors had turned over to the Atlantic Trust Company, as trustee of the residuary estate, a fund of $426,086.66 for the trust for the benefit of Ruth Moore Lee, and a like fund for the trust for the benefit of Faith Moore (R. 39). To that extent, it may be, the life interests of the two daughters had vested in possession and enjoyment. As to so much of the residuary estate, however, as had not been administered and turned over to the trustee, the interests of the daughters were contingent and uncertain, since, in due course of administration, it had not been ascertained that a surplus remained therefrom after the debts and expenses should be paid. It could not be said that either of the daughters was certainly entitled to receive or enjoy any part of the property except such as had been delivered to the trustee. And this being so, the taxes assessed against the property then undelivered were collected upon contingent beneficial interests which had not become vested prior to July 1, 1902, and should be refunded under the act of 1902.

United States v. *Jones,* 236 U. S. 106.
McCoach v. *Pratt,* 236 U. S. 562.

On July 1, 1902, it was entirely uncertain whether the Atlantic Trust Company, as trustee of the residuary

trusts, would receive for the benefit of the daughters any property in excess of the two funds of $426,086.66 each then in its hands. Claims amounting to some $53,000 had been paid by the Executors, but there still existed unsettled claims against the estate to a very considerable amount. The testator was at his decease a partner in the firm of Moore & Schley, bankers and brokers (R. 38), and as a partner his estate was liable to its last penny for the debts of the firm. There were certain claims against this partnership which were unsettled on July 1, 1902, notably a suit brought against these Executors and the surviving partners in March, 1902, seeking to recover alleged promoters' profits in connection with the organization of the American Malt Company (R. 40). This suit was brought by a stockholder in the right of the company for an accounting for $12,500,000 of preferred stock and $13,740,000 of common stock of the company, and $9,000,000 cash. It is a reasonable presumption that these stocks were of substantial value, and the amount of cash claimed was in itself sufficient to wipe out not merely the testator's entire estate, but almost twice as much in addition. Neither the result of the suit nor the value of the stocks is shown by the finding, but it does appear that the suit was pending on July 1, 1902 (R. 39, 40), and hence that the ascertainment of the debts and the distribution of the residuary legacies was prevented by the pendency of litigation of a grave and serious character.

Moreover, as events have proved, there were in existence on July 1, 1902, other claims against the estate, for large amounts, then unpresented to the Executors. Among these was the claim of the John L. Roper Lumber Company for 875 shares of the common stock of the Norfolk & Southern Railroad Company, worth several thousand dollars, which claim was rejected by the executors in February, 1904 (R. 40). There was also the claim of the receiver of the Columbus, Sandusky & Hock-

ing Railroad Company, which was first presented in 1908, and on which a judgment was entered against the Executors in 1915 for some $20,000 (R. 40). That a claim first presented to the Executors in 1908, nearly eight years after the publication of the notice to creditors, was enforceable and in fact judicially enforced against them, is a demonstration that so long as assets remained in their hands it was uncertain whether the residuary legatees would have the enjoyment thereof.

In this connection, the case of *Uterhart* v. *U. S.*, 240 U. S. 598, should be considered. This case arose, as does the present case, under the laws of New York. The testator died in April, 1900, more than two years prior to the repeal of the act of 1898, and a decree settling the construction of the will was made in January, 1902, also prior to such repeal. Under the decree, the children were held to be entitled only to such income as the trustees should in their discretion see fit to pay to them. This court held that the interests of the children were contingent, and not vested prior to July 1, 1902, within the meaning of the refunding act of that year, except with respect to such amounts as were actually paid out of the trust fund by the trustees prior to that date (p. 605). The interests to be received by the children in this case, subject to the discretion of the trustees, were obviously no more contingent than the interests to be received by the two daughters of John G. Moore, subject to the payment of debts and expenses. The Court of Claims allowed the recovery of the tax paid on the interests of the two nieces prior to their attaining twenty-one on the authority of the *Uterhart* case, but appears to have failed to appreciate its significance as to our other claims.

The case of *Henry* v. *United States*, recently decided by this court (February 2, 1920), is highly important. In this case the estate was settled, as in the case at bar, under the laws of New York. The taxes in question were

levied on a trust fund transferred to the trustee thereof (the executor himself), and on payments made to the residuary legatees, all prior to July 1, 1902, and also prior to the completion of the publication of the notice to creditors. In sustaining the right of the Government to retain these taxes, the court said:

> *"There is no doubt that if the claimant had retained the funds in his hands, as he had a legal right to do, the interest of the legatees would not have vested in possession within the meaning of the statute, whatever the probabilities and however solvent the estate."*

The court further said that the interest of the trustee was held in possession, and that "for the purposes of this act the interest in a fund transferred from an estate to a trustee for ascertained persons is vested in possession no less than when it is conveyed directly to them."

Under the decision in this case, the test is whether the trust fund on July 1, 1902, had been turned over to the trustee, or whether it continued in the hands of the executor, subject to the payment of debts and expenses. Applying this rule in the present case, such portions of the trust funds as had been delivered to the Atlantic Trust Company as trustee prior to July 1, 1902, were vested and the taxes thereon unrecoverable under the refunding act of 1902, but such portions as remained in the hands of the executors, subject to the payment of debts and expenses, were contingent and the taxes thereon recoverable. The facts in the *Henry* case differed from our case only in this, that there the executor had not completed the publication of his notice to creditors on July 1, 1902. This, however, was immaterial under the laws of New York, since the completion of such publication in no wise freed the assets in the hands of the executors from liability for outstanding debts, as we have already shown. In our case, the estate was actually in litigation on July

1, 1902, and while so much of it as had been previously turned over to the trustee must be treated as vested, the remaining portions of the residuary interests of the daughters were contingent upon the results of the litigation and upon the enforcement of the debts of the testator.

We submit, therefore, that the tax assessed against so much of the life interests of each of the daughters in the residuary estate, as was in excess of $426,086.66, should be refunded. If it were not for the progressive rates established by the act, the amounts refundable could be ascertained as to each daughter by deducting from the assessed value of the trust fund in which she had a life interest, $785,000.24, the amount of the trust fund which had been turned over to the trustee prior to July 1, 1902, $426,086.66, and figuring the tax on the difference. The computation for ascertaining the amount refundable is slightly complicated by the fact that the value of the property passing to each daughter, as assessed, was over $500,000, and the rate therefore .01875, while the value of such property is now found to be less than $500,000, and the rate therefore .015. Applying the method adopted by the Commissioner, reckoning the income at four per cent on $426,086.66, ascertaining the present worth of this at the given age from the Commissioner's mortuary tables, figuring the tax which should have been assessed on this amount at the rate of .015, and deducting this from the tax paid on the life estate, to ascertain the amount refundable, the computation takes the following form:

Ruth Moore Lee—Amount of fund received by Atlantic Trust Company prior to July 1, 1902.....	$426,086.66
Income thereof at four per cent.	17,043.47
Present worth, age 25, rate 17.80274	303,420.46

Tax on this at rate of .015..	4,551.31	
Tax paid on life interest in $785,000.24 at rate of .01875	10,481.37	
Difference, being the tax collected on a life interest in $785,000.24 in excess of the tax on a life interest in $426,086.66		$5,930.06
Faith Moore—Amount of fund received by Atlantic Trust Company prior to July 1, 1902	$426,086.66	
Income thereof at four per cent.	17,043.47	
Present worth, age 21, rate 18.32932	312,395.21	
Tax on this at rate of .015..	4,685.93	
Tax paid on life interest in $785,000.24 at rate of .01875	10,791.38	
Difference, being the tax collected on a life interest in $785,000.24 in excess of the tax on a life interest in $426,086.66		6,105.45
		$12,035.51

The amount refundable in the case of Ruth Moore Lee is found to be $5,930.06, and in the case of Faith Moore $6,105.45, a total for the two of $12,035.51.

The appellants withdrew in the court below and also withdraw here the propositions set out in subdivisions (1) and (3) of paragraph XIX of their petition (R. 20). They rely solely on the propositions urged in this brief.

Summary.

We submit that we are entitled to recover the following:

(1) The amount of the taxes paid on the annuities of Ella L. Moore, Wilson Godfrey and Louisa Godfrey, and the life interests of the two daughters in the residuary estate, as argued under the first specification of error, amounting to $23,033.83.

(2) If this claim should not be allowed in full, the taxes paid on the life interests of the two daughters in the residuary estate, in excess of the taxes payable upon their life interests in the amount of the trust funds turned over to the Atlantic Trust Company prior to July 1, 1902, as argued under the second specification of error, that is to say, a recovery of $12,035.51.

We further submit that the judgment of the Court of Claims should be reversed, and the cause remanded, with directions to enter judgment for the claimants as above prayed, in addition to the sum of $600 for which judgment has already been entered in their favor.

Respectfully submitted,

THOMAS M. DAY,
Attorney for Appellants.

H. T. NEWCOMB,
Of Counsel.

APPENDIX OF STATUTES.

A. Extracts from English Death Duty Statutes.

Sections 2, 7 and 8 of the English LEGACY DUTY ACT, *1796, 36 Geo. III, c. 52. (Hanson on Death Duties, 569, 573, 574.)*

II. And be it further enacted, That upon every legacy, specifick or pecuniary, or of any other description, of the amount or value of twenty pounds or more, given by any will or testamentary instrument of any person who shall die after the passing of this Act, out of the personal estate of the person so dying, and also upon the clear residue and upon every part of the clear residue of the personal estate of every person who shall so die, whether testate or intestate, and leave personal estate of the clear value of one hundred pounds or upwards, which shall remain after deducting debts, funeral expenses, and other charges, and specifick and pecuniary legacies (if any), whether the title to such residue, or to any part thereof, shall accrue by virtue of any testamentary disposition, or upon intestacy, there shall be raised, levied, collected, and paid, unto and for the use of His Majesty, his heirs and successors, the several duties, after the rates and in manner following; (that is to say) where any such legacy, or any residue or part of residue, of any such personal estate, shall be given or shall pass to or for the benefit of a brother or sister of the deceased, or any descendant of a brother or sister of the deceased, there shall be charged a duty of two pounds for every one hundred pounds of the value of any such legacy, or residue or part of residue, and so after the same rate for any greater or less sum; where any such legacy, or any residue or part of residue of any such personal estate, shall be given or shall pass to or for

the benefit of a brother or sister of a father or mother of the deceased, or any descendant of a brother or sister of a father or mother of the deceased, there shall be charged three pounds for every one hundred pounds of the value of such legacy, or residue or part of residue, and so after the same rate for any greater or less sum; and where any such legacy, or any residue or part of residue of any such personal estate, shall be given or shall pass to or for the benefit of a brother or sister of a grandfather or grandmother of the deceased, or any descendant of a brother or sister of a grandfather or grandmother of the deceased, there shall be charged a duty of four pounds for every one hundred pounds of the value of such legacy, or residue or part of residue, and so after the same rate for any greater or less sum; and where any such legacy, or residue or part of residue of any such personal estate, shall be given or shall pass to or for the benefit of any person in any other degree of collateral consanguinity to the deceased than is herein-before described, or any stranger in blood to the deceased, there shall be charged a duty of six pounds for every one hundred pounds of the value of such legacy, or residue or part of residue, and so after the same rate for any greater or less sum: Provided always, that nothing herein contained shall extend to charge with any duty any legacy, or any residue or part of residue, of any personal estate, which shall be given or shall pass to or for the benefit of the husband or wife of the deceased, or to or for the benefit of any of the Royal Family.

VII. And be it further enacted, That any gift by any will or testamentary instrument of any person dying after the passing of this Act, which shall, by virtue of such will or testamentary instrument, have effect, or be satisfied out of the personal estate of such person so dying, or out of any personal estate which such person shall have power to dispose of as he or she shall think fit, shall be deemed and taken to be a legacy

within the intent and meaning of this Act, *whether the same shall be given by way of annuity or in any other form,* and whether the same shall be charged only on such personal estate, or charged also on real estate of the testator or testatrix, who shall give the same; except so far as the same shall be paid or satisfied out of such real estate, in a due execution of the will or testamentary instrument by which the same shall be given; and every gift which shall have effect as a donation *mortis causa* shall also be deemed a legacy within the intent and meaning of this Act.

VIII. And be it further enacted, *That the value of any legacy given by way of annuity, whether payable annually or otherwise, for any life or lives, or for years determinable on any life or lives, or for years or other period of time, shall be calculated, and the duty chargeable thereon shall be charged, according to the tables in the schedules hereunto annexed;* and the duty chargeable on such annuity shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing the payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively before or on completing the respective payments of the three succeeding years' annuity respectively; and the value of any such annuity, if determinable upon any contingency beside the death of any person or persons, shall be calculated without regard to such contingency: Provided always, that if any such annuity shall determine by the death of any person, before four years' payment of such annuity shall become due and payable, then and in such case the duty shall be payable in proportion only to so many of the payments of the said annuity as actually accrued and became due and payable; and in case any such annuity shall at any time determine upon any other contingency than the death of the person or persons, then and in such case, not only all payments of duty which would

otherwise become due after the happening of such contingency, if any such would become due, shall cease, but it shall be lawful for the person or persons who shall have paid any duties which shall have previously become due, to apply for and obtain a return of so much of the duties so paid as will reduce the same to the like duty as would have been payable by such person or persons for such annuity, calculated according to the term for which the same have endured; which abatement the said Commissioners for Management of the Stamp Duties shall settle and determine according to the tables in the schedules hereunto annexed, and shall cause the amount of such abatement to be paid to the person or persons entitled to the same, out of any monies in their hands arising from the duties imposed by this Act.

Sections 2, 21 and 31 of the English SUCCESSION DUTY ACT, *1853, 16 & 17 Vict., c. 51.* (*Hanson on Death Duties, 774, 780, 784.*)

II. Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substituted limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a "succession", and the term "successor" shall denote the person so entitled; and the term "predecessor" shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived.

XXI. The interest of every successor, except as herein provided, in real property, shall be considered to be of the value of an annuity equal to the annual value of such property, after making such allowances as are hereinafter directed, and payable from the date of his becoming entitled thereto in possession, or to the receipt of the income or profits thereof during the residue of his life, or for any less period during which he shall be entitled thereto; and every such annuity for the purposes of this Act shall be valued according to the tables annexed to this Act; and the duty chargeable thereon shall be paid by eight equal half-yearly installments, the first of such installments to be paid at the expiration of twelve months next after the successor shall have become entitled to the beneficial enjoyment of the real property in respect whereof the same shall be payable, and the seven following installments at half-yearly intervals of six months each, to be computed from the day on which the first installment shall have become due, provided that if the successor shall die before all such installments have become due, then any installments not due at his decease shall cease to be payable, except in the case of a successor who shall have been competent to dispose by will of a continuing interest in such property, in which case the installments unpaid at his death shall be a continuing charge on such interest, in exoneration of his other property, and shall be payable by the owner for the time being of such interest.

XXXI. Where it shall be required to calculate, for the purposes either of this Act or of the Legacy Duty Acts, the value of any annuity, or of any interest chargeable with duty as an annuity, such value shall, after the time appointed for the commencement of this Act, be calculated according to the tables in the schedule annexed to this Act, and not according to the tables in the schedule annexed to the Act of the thirty-sixth year of the reign of King George III., chapter fifty-two, and such annuity or interest shall be chargeable with duty accordingly.

B. Extracts from the United States Legacy and Succession Tax Laws of 1864 and 1866.

Sections 124 and 125 of the Act of 1864, containing the Legacy Tax Law.

[*Sections 124 and 125 of the act of 1864* (*13 Stats. 285*), were identical with sections 29 and 30 of the act of 1898, except for the exemption of $1,000, instead of $10,000, the rates prescribed for the several classes of relationship, the omission in the earlier act of the clause increasing the rate progressively with reference to the value of the property, and the use in one place of the word "assessor", instead of "collector". The material portion of section 29 of the act of 1898 is quoted, *infra.*]

Section 144 of the Succession Tax Law of 1864.

> "That it shall be lawful for the commissioner, in his discretion, upon application made by any person who shall be entitled to a succession in expectancy, to commute the duty presumptively payable in respect of such succession for a certain sum to be presently paid, and for assessing the amount which shall be so payable he shall cause a present value to be set upon such presumptive duty, regard being had to the contingencies affecting the liability to such duty, and the interest of money involved in such calculation being reckoned at the rate for the time being allowed by the commissioner in respect of duties paid in advance, and upon the receipt of such certain sum he shall give discharges to the successor accordingly." *13 Stats. 290.*

Amendments to the Legacy Tax Law of 1864 made by the Act of 1866.

Section 124 was amended by adding an exemption of a legacy to a minor child of $1,000 or less.

Section 125 was amended as follows:

> (1) "By inserting after the words 'that the tax or duty aforesaid,' the following: 'shall be

due and payable whenever the party interested in such legacy or distributive share or property or interest aforesaid shall become entitled to the possession or enjoyment thereof, or to the beneficial interest in the profits accruing therefrom, and the same'."

(2) "By inserting after the words 'United States', in the first sentence of said section, the words: 'And every administrator, executor or trustee, having in charge or trust any legacy or distributive share, as aforesaid, shall give notice thereof in writing to the assessor or assistant assessor of the district where the deceased grantor or bargainer last resided, within thirty days after he shall have taken charge of said trust'."

(3) "By inserting after the words 'shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty thereon', the words: 'And in case of wilful neglect, refusal, or false statement by such executor, administrator, or trustee, as aforesaid, he shall be liable to a penalty of not exceeding one thousand dollars, to be recovered with costs of suit'. Any tax paid under the provisions of sections 124 and 125 shall be deducted from the particular legacy or distributive share on account of which the same is charged" (*31 Stat. 948*).

C. Extracts from the United States War Revenue Law of 1898 and Supplementary Legislation.

Act of June 13, 1898, Section 29.

The portions of section 29 material to this case are as follows:

"SEC. 29. That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or

by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows—that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:

"First. Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy five cents for each and every hundred dollars of the clear value of such interest in such property.

* * * * * *

"Fifth. Where the person or persons entitled to any beneficial interest in such property shall be in any other degree of collateral consanguinity than is hereinbefore stated, or shall be a stranger in blood to the person who died possessed, as aforesaid, or shall be a body politic or corporate, at the rate of five dollars for each and every hundred dollars of the clear value of such interest: *Provided*, That all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed, as aforesaid, shall be exempt from tax or duty.

"Where the amount or value of said property shall exceed the sum of twenty-five thousand dollars, but shall not exceed the sum or value of one hundred thousand dollars, the rates of duty or tax above set forth shall be multiplied by one and one-half; and where the amount or value of said property shall exceed the sum of one hundred thousand dollars, but shall not exceed the sum of five hundred thousand dollars, such rates of duty shall be multiplied by two; and where the amount or value of said property shall exceed the sum of five hun-

dred thousand dollars, but shall not exceed the sum of one million dollars, such rates of duty shall be multiplied by two and one-half; and where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three." *30 Stat. 448, 464-5.*

Act of June 13, 1898, Section 31.

"SECTION 31. That all administrative, special, or stamp provisions of law, including the laws in relation to the assessment of taxes, not heretofore specifically repealed are hereby made applicable to this Act." *30 Stat. 448, 466.*

Section 3182, Revised Statutes.

"The Commissioner of Internal Revenue is hereby authorized and required to make the inquiries, determinations, and assessments of all taxes and penalties imposed by this Title, or accruing under any former internal-revenue act, where such taxes have not been duly paid by stamp at the time and in the manner provided by law, and shall certify a list of such assessments when made to the proper collectors respectively, who shall proceed to collect and account for the taxes and penalties so certified. . . . And all provisions of law for the ascertainment of liability to any tax, or the assessment or collection thereof, shall be held to apply, so far as may be necessary, to the proceedings herein authorized and directed." *R. S. 3182.*

Act of March 2, 1901; 31 Stat. 946.

See brief, page 40.

Act of April 12, 1902, Section 7.

The portion of Section 7 material to this case is:—

"SECTION 7. That section . . . twenty-nine of the Act of June thirteenth, eighteen hundred and ninety-eight, and all amendments . . . be, and the same are hereby, repealed." *32 Stat. 96.*

Act of April 12, 1902, Section 8.

The portion of Section 8 material to this case is:—

"SECTION 8. That all taxes or duties imposed by section twenty-nine of the Act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, prior to the taking effect of this Act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of section thirty of said Act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows: . . ." *32 Stat. 96.*

Act of April 12, 1902, Section 11.

"SECTION 11. That this Act, except as otherwise specially provided for in the preceding section, shall take effect July first, nineteen hundred and two."

Act of June 27, 1902, Section 3.

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, the Secretary of the Treasury be, and he is hereby, authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-

eight upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two." *32 Stat. 406.*

Act of July 27, 1912.

"That all claims for the refunding of any internal tax alleged to have been erroneously or illegally assessed or collected under the provisions of section twenty-nine of the act of Congress approved June thirteenth, eighteen hundred and ninety-eight, known as the war-revenue tax, or of any sums alleged to have been excessive, or in any manner wrongfully collected under the provisions of said act may be presented to the commissioner of internal revenue on or before the first day of January, nineteen hundred and fourteen, and not thereafter.

"SEC. 2. That the Secretary of the Treasury is hereby authorized and directed to pay, out of any moneys of the United States not otherwise appropriated, to such claimants as have presented or shall hereafter so present their claims, and shall establish such erroneous or illegal assessment and collection, any sums paid by them or on their account or in their interest to the United States under the provisions of the act aforesaid." *37 Stat. 240.*

D. Extracts from the Statutes of New York.

New York Laws of 1897, Chap. 417, Sec. 3.

"Income of trust fund not alienable; merger. The right of the beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, can not be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other trust in personal property may be transferred. Whenever a beneficiary in a trust for the receipt of the income of personal

property is entitled to a remainder in the whole or a part of the principal fund so held in trust, subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such income, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder."

New York Laws of 1896, Chap. 547, Sec. 83.

"What trust interest may be alienated. The right of a beneficiary of an express trust to receive rents and profits of real property and apply them to the use of any person can not be transferred by assignment or otherwise; but the right and interest of the beneficiary of any other trust may be transferred. Whenever a beneficiary in a trust for the receipt of the rents and profits of real property is entitled to a remainder in the whole or a part of the principal fund so held in trust subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such rents and profits, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder."

Extract from Section 230 of the New York Tax Law.

"The value of every future, contingent or limited estate, income, interest or annuity dependent upon any life or lives in being shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for computing the present value of all future and contingent interests or estates shall be five per centum per annum."

N. Y. Laws of 1896, ch. 908, sec. 230.

This section was revised from N. Y. Laws 1887, ch. 713, quoted from on p. 44 of this brief.

By section 88 of the New York Insurance Law, the value of policies of life insurance was directed to be "computed according to the American experience table of mortality at the rate of four and one-half per cent. per annum." 2 N. Y. Laws 1892, 1969, 1970.

Sections 2718, 2721 and 2722 of the Code of Civil Procedure of New York, as in effect during the years 1899 to 1909, inclusive.

> "Section 2718. The executor or administrator at any time after the granting of his letters, may insert a notice, once in each week for six months in such newspaper or newspapers printed in the county as the surrogate directs, requiring all persons having claims against the deceased to exhibit the same, with the vouchers therefor, to him, at a place to be specified in the notice, at or before a day therein named, which must be at least six months from the day of the first publication of the notice. . . . [Immaterial matter omitted.] If a suit be brought on a claim which is not presented to the executor or administrator within six months from the first publication of such notice, the executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin before such suit was commenced."
>
> "Section 2721. No legacy shall be paid by any executor or administrator until after the expiration of one year from the time of granting letters testamentary or of administration, unless directed by the will to be sooner paid. If directed to be sooner paid, the executor or administrator may require a bond, with two sufficient sureties, conditioned, that if debts against the deceased duly

appear, and there are not other assets to pay the same, and no other assets sufficient to pay other legacies, then the legatees will refund the legacy so paid, or such ratable portion thereof with the other legatees, as may be necessary for the payment of such debts, and the proportional parts of such other legacies, if there be any, and the costs and charges incurred by reason of the payment to such legatee, and that if the probate of the will, under which such legacy is paid, be revoked, or the will declared void, that such legatee will refund the whole of such legacy, with interest, to the executor or administrator entitled thereto. After the expiration of one year, the executors or administrators must discharge the specific legacies bequeathed by the will and pay the general legacies, if there be assets. If there are not sufficient assets, then an abatement of the general legacies must be made in equal proportion. Such payment shall be enforced by the surrogate in the same manner as the return of an inventory, and by a suit on the bond of such executor or administrator whenever directed by the surrogate."

"Section 2722. In either of the following cases a petition may be presented to the surrogate's court, praying for a decree, directing an executor or administrator to pay the petitioner's claim, and that he be cited to show cause why such a decree should not be made:

"1. By a creditor, for the payment of a debt, or of its just proportional part, at any time after six months have expired since letters were granted.

"2. By a person entitled to a legacy, or any other pecuniary provision under the will, or a distributive share, for the payment or satisfaction thereof, or of its just proportional part, at any time after one year has expired since letters were granted.

"On the presentation of such a petition, the surrogate must issue a citation accordingly; and on the return thereof, he must make such a decree in the premises as justice requires. But in either

of the following cases the decree must dismiss the petition without prejudice to an action or an accounting, in behalf of the petitioner:

"1. Where an executor or administrator files a written answer, duly verified, setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity and legality, absolutely, or on information and belief.

"2. Where it is not proved, to the satisfaction of the surrogate, that there is money or other personal property of the estate, applicable to the payment or satisfaction of the petitioner's claim and which may be so applied, without injuriously affecting the rights of others, entitled to priority or equality of payment or satisfaction."

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In the Supreme Court of the United States.

OCTOBER TERM, 1919.

JOHN W. SIMPSON AND THOMAS THACHER, as executors of the estate of John G. Moore, deceased, appellants,
v.
THE UNITED STATES.
No. 213.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

On March 19, 1917, appellants, as executors of the estate of John G. Moore, deceased, filed in the Court of Claims their second amended petition [1] to recover from the United States the sum of $23,633.83, paid, on April 15, 1901, as a tax on the interest of the legatees of the deceased in his personal estate. (Rec. 1–23.)

The general traverse was entered thereto. (Rec. 30–31.)

The findings of fact (Rec. 31–41) show that John G. Moore died in New York County, N. Y., on June

[1] The original petition was filed on June 2, 1908, and the first amended petition on Feb. 8, 1910. (Rec. 1.)

23, 1899, leaving a valid last will and testament and codicil thereto; that on June 30, 1899, said last will and codicil were duly admitted to probate and record in the surrogate's court of said county, and that letters testamentary were issued to appellants as executors thereof. (Rec. 31.) Beginning about April 25, 1900, the executors ran the six months' notice to creditors required by the New York law. (Rec. 38.)

The will (Rec. 24–30) contained the following bequests which are material to the case, and against which succession taxes were assessed and collected in the amounts stated:

Name.	Nature of interest.	Assessed value.	Tax.
Ruth Moore (Lee), daughter	Life interest in $785,000.24	$559,006.21	$10,481.37
Faith Moore, daughter	Life interest in $785,000.24	575,540.83	10,791.38
Ella L. Moore, sister	Life annuity of $6,000	76,542.96	861.10
Wilson Godfrey, uncle	Life annuity of $1,200	10,536.62	316.10
Louisa Godfrey, stranger	Life annuity of $1,200	11,677.57	583.88
Katherine Moore, niece	Trust fund of $20,000	20,000.00	300.00
Constance Moore, niece	Trust fund of $20,000	20,000.00	300.00
Total			23,633.83

The bequests to Ruth Moore (Lee) and Faith Moore consisted each of a life interest in one-third of the residuary estate. The remaining one-third was bequeathed to the testator's widow, and therefore was not subject to the tax. The testator directed the executors to convert said estate into money (except securities suitable for permanent investment) and to turn the same over to a trust company to be designated by them, which should

receive the income thereof and pay it over to the three beneficiaries. (Will, cl. 14, Rec. 27–28.)

On April 12, 1901, the Collector of Internal Revenue of the Third District of New York demanded payment of the sum in question as the tax due on the interest of the legatees in said estate. It was demanded under section 29 of the act of Congress approved June 13, 1898 (ch. 448, 30 Stat. 448), known as the Spanish War Revenue Act. The tax was paid without protest and was in due course remitted by the collector to the United States. (Rec. 33.) At that time the War Revenue Act was in full force.

The computation and assessment of said tax upon the several bequests (except the bequests to Katharine and Constance Moore) was made in accordance with certain general rules and mortuary tables prescribed and promulgated by the Commissioner of Internal Revenue on December 16, 1898, the expectancies of life upon which tables were based being those shown by the "actuaries' or combined experience table," and the rate of discount 4 per cent. (Rec. 33–38.)

Prior to July 1, 1902, appellants had set up the trust funds for the payment of the annuities to Ella L. Moore, Wilson Godfrey, and Louisa Godfrey, and had paid the annual income to which each was entitled, and had paid over to the trustee of Katherine Moore and Constance Moore the two sums of $20,000 provided in said will, and all absolute bequests (not here involved) had been paid in full. (Rec., 39.)

As regards the residuary estate (the one-third interests in which had been assessed at $785,000 each—being a total valuation of $2,355,000 for the estate),[1] the executors prior to July 1, 1902, had named the Atlantic Company of New York as trustee, and had turned over to said trustee for *each* of the three funds $183,333 in cash, and stocks and bonds of the value of $242,753, making an aggregate value for each trust fund of $426,086.66. (Rec., 39.)

In addition, said executors, on said date, had on hand $49,021 cash in bank, and $548,948 cash on account with the firm of Moore & Schley, making a total of $597,969, and also had on hand securities of the value of approximately $1,200,000. At that time the firm of Moore & Schley was in liquidation. Although the estate had been under administration for more than three years, there still remained outstanding certain claims for which (if proved) the estate would be liable. In only one of these has there been a recovery, and in that case judgment was satisfied by the payment of $15,000 in 1915. (Rec., 39–40.)

On or about October 29, 1907, claimants presented to the Commissioner of Internal Revenue a claim for the refund of the sum of $21,640.55 of the taxes paid by them "or such greater amount thereof as the Commissioner might find to be refundable under the Refunding Act of June 27, 1902 (32 Stat. 406), or

[1] Inasmuch as appellants refer to this as an "arbitrary" assessment (Brief, p. 11), it is interesting to note that it was in fact more than $700,000 short of the actual value of the estate on July 1, 1902, as found by the Court of Claims.

other remedial statutes." Said claim was rejected by the Commissioner shortly ~~before~~ after the filing of claimants' original petition in the Court of Claims on June 2, 1908. (Rec. 40.)

The case was heard in the Court of Claims on the ~~third~~ second amended petition, filed March 19, 1917, which purports to be based on both the act of June 27, 1902, and the act of July 27, 1912. (Rec. 22.) The Court of Claims held that claimants were entitled to recover the amount of the tax assessed and collected on the legacies of Katherine and Constance Moore, and that as to the other items of their claim the petition should be dismissed. (Rec. 40.)

Accordingly, the Court of Claims gave judgment in favor of the claimants for $600, and from said judgment claimants appeal. (Rec. 40–41.) There is no cross appeal by the Government.

ARGUMENT.

I.

Recovery can not be had on the ground that assessing of the tax on the several life interests by the use of mortuary tables and a fixed rate of interest was illegal.

1. No claim for refund on this ground has been made to the Treasury Department.

The only claim for refund of the taxes in question was filed with the Commissioner of Internal Revenue in October, 1907. This claim asked for the refund of such fund as the Commissioner might find to be due under the act of June 27, 1902, "or other remedial statutes."

The taxes had been paid without protest and claim was not made until more than five years after payment. The only statute under which a refund could be had at that time was the act of June 27, 1902, which provided for the refund, upon proper application, of all taxes assessed under the War Revenue Act of 1898, upon contingent beneficial interests which had not become vested prior to July 1, 1902. (Rec. 3–4.)

There was not then in existence any statute under which taxes voluntarily paid on beneficial interests which had vested in possession or enjoyment prior to July 1, 1902, could be recovered on the ground that the method employed in assessing the taxes was unauthorized, or that said taxes by reason of such method were erroneous or excessive.

The act providing for the refund of all taxes erroneously or illegally assessed or collected under said War Revenue Act was not passed until July 27, 1912, more than five years after the filing of said claim, and four years after the filing of the original petition in this suit. (Rec. 4.) No claim for refund for the alleged illegal assessment on account of the method employed was made after the passage of this act, nor was any demand made for payment on account of any claim previously filed.

Consequently, the only ground for repayment presented to or considered by the officials of the Treasury Department was the claim filed in October, 1907, which necessarily was limited to the question whether or not the taxes in question had been assessed and

collected on interests which had become vested prior to July 1, 1902, because there then existed no other ground on which they could be refunded.

The case is unlike that of *Sage* v. *United States*, 250 U. S. 33, cited by the appellants. There, although the contention under both acts was the same, namely, that the taxes had been assessed on beneficial interests which had vested in possession and enjoyment, the claimants after the passage of the act of July 27, 1912, made application to the Secretary of the Treasury for payment of the residue of the claim previously filed.

As said in the *Sage Case*, the act of 1912 created new rights—"rights where they had not existed before" (250 U. S. 39), and no claim of right under this statute has been presented to the United States. Consequently there has been no refusal upon the part of the United States to pay appellants' claim under said act, and there is no foundation for the suit. The objection is not merely technical; it is fundamental and jurisdictional. (Compare *Rand* v. *United States*, 249 U. S. 503.

2. The method of assessment employed was authorized by the War Revenue Act of 1898.

By section 31 of the War Revenue Act of 1898 all laws in relation to the assessment of taxes were made applicable. Among the laws thus adopted by reference are sections 321 and 3182 of the Revised Statutes, the first of which provides that the Commis-

sioner of Internal Revenue, under the direction of the Secretary of the Treasury,

> shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue. (Comp. Stat. 1916, sec. 492.)

and the second of which authorizes and requires the Commissioner of Internal Revenue

> to make inquiries, determinations, and assessments of all taxes and penalties. (Comp. Stat. 1916, sec. 5904.)

These provisions were construed by the Treasury Department to authorize the promulgation of general rules for determining the value of life interests and annuities, and as early as December 16, 1898, the Commissioner of Internal Revenue issued the general rules set forth in Finding V. (Rec. 33–38.)

This construction primarily adopted in the enforcement of the act was followed without deviation during the existence of the law, and has been consistently maintained by the executive officers. This is sufficiently shown by the references in the cases about to be cited.

Furthermore, this court has approved the interpretation placed upon the law by the officials of the Treasury Department.

Knowlton v. *Moore*, 178 U. S. 41, concerned the validity of a succession tax imposed under the authority of section 29 of the War Revenue Act of 1898. Included in the legacy subject to the tax was a life interest the value of which was assessed by the collector "according to United States tables" (p. 44). While the method of assessment was not directly attacked in that case, it was laid before this court and received no unfavorable comment.

Facts precisely like those here involved were passed upon by this court in *United States* v. *Fidelity Trust Company*, 222 U. S. 158. The testator had died leaving his residuary estate in trust to pay over the income to his niece during her life. The opinion of Mr. Justice Holmes states that the value of this life interest was appraised "with the aid of mortality tables, the rate of interest being assumed to be 4 per cent" and an inheritance tax upon this value was assessed and paid.

The suit was one for a refund under the act of June 27, 1902. It was contended, as is shown by the briefs, that Congress meant to tax life interests only to the extent of payments as they became due to the beneficiary; and in support of this contention it was urged that the method (the same there as here) employed for ascertaining the clear value of such interests was improper. Indeed, the argument rested upon the contention that no effective method of ascertaining such clear value, in advance of the actual payment of the income, could be found. In holding that the tax assessed in 1900 upon the life

estate valued in the manner described was properly collected and was unaffected by the relieving statute, this court necessarily gave its approval to the method of assessment.

It may be said that the decision just mentioned disposes of appellants' contention that the statute here did not sanction a tax which could not be deducted from something immediately payable. Such a contention is also wholly irreconcilable with the established rule that a succession tax accrues as of the moment of the benefactor's death. *Hertz* v. *Woodman*, 218 U. S. 205.

The appellants are asking this court to deduce from the use of the words "clear value," found in section 29, the proposition that value in these cases can not be determined by general rules. The words themselves do not warrant this deduction; ordinary business custom is against it; administrative construction has been contrary to it; and the decisions of this court do not sustain it.

Other decisions recognizing the method of assessing life interests employed by the Commissioner of Internal Revenue are *Rand* v. *United States*, 249 U. S. 503, 506, and *Henry* v. *United States*, No. 162, decided February 2, 1920. See also *Dunbar* v. *Dunbar*, 190 U. S. 340, 345.

3. The method employed is well recognized, is the only one practicable, and is neither unreasonable nor unjust.

The case of *Knowlton* v. *Moore*, 178 U. S. 41, squarely decided that the succession tax imposed by the war-revenue act of 1898 was not a tax on

property, but a tax on a right or privilege, in the nature of an excise tax.

An excise tax, not being as such a tax on value, may be fixed according to general measure or standard. The most that is required is that the standard have a reasonable relation to value. Cases sustaining such assessments are very numerous.

In the taxation of corporate privileges this court has sustained a tax upon the average gross receipts per mile multiplied by the number of miles within the taxing jurisdiction (*Maine* v. *Grand Trunk Railway*, 142 U. S. 217); a tax determined by the amount of dividends made and declared (*Home Insurance Co.* v. *New York*, 134 U. S. 594), and a tax on the number of miles of telegraph lines within the taxing jurisdiction (*Postal Telegraph Co.* v. *Adams*, 155 U. S. 688).

It is, of course, true that the value of physical property other than money can not ordinarily be arrived at by the application of fixed rules or mathematical calculations. That is a reason why, under certain State constitutions, laws attempting to tax physical property upon the basis of some arbitrary measure or standard have been held unconstitutional. But such cases have no application here. In cases like this, general rules furnish the most accurate available measure of value, are in every sense appropriate, and are altogether just.

It is a matter of common knowledge that calculations of value which involve the expectancy of life or the present value of obligations to pay money in

the future are made in the commercial world upon the basis of mortuary tables and fixed rates of interest. Many statutes imposing succession taxes require life interests and annuities to be valued in this way. The following statutes containing this feature have been in force many years:

New York Laws of 1892, c. 399, as amended by the laws of 1895, c. 556; Consal. Laws, 2d ed., vol. 8, pp. 8553–4,

Maine Laws of 1895, c. 146, as amended by the laws of 1895, c. 96; Rev. Stats. (1916), ch. 69, sec. 2.

Ohio Laws of 1894, c. 166; Gen. Code, vol. 3, sec. 5343.

California Laws of 1893, c. CLXVIII as amended by the laws of 1895, c. XXVII; Hennings Gen. Laws, 2d ed., vol. 5, p. 1985.

Massachusetts Laws of 1891, c. 425; Revised Laws, 1902, vol. 1, p. 280.

Connecticut Laws of 1889, c. CLXXX.

This method of assessment has been recognized as valid in numerous court decisions:

People v. *Trust Company*, 266 Ill. 139.
Howe v. *Howe*, 179 Mass. 546.
State v. *Probate Court*, 136 Minn. 392.
In re Tracy, 179 N. Y. 501.
In re White, 208 N. Y. 64.
Crenshaw v. *Knight*, 127 Tenn. 708.
In re Cornwallis, 11 Ex. 580.

The general use made of these methods of assessment is the most convincing proof possible that they are just and adapted to the ends sought, namely, the ascertainment of the value of a life interest in income.

Furthermore, it is apparent that the method in question is the only one that could be employed. Obviously it would not be possible for a collector of internal revenue in every instance to forecast the expectancy of life of the particular beneficiary, and to determine the exact rate of interest for the particular fund throughout the period of expectancy.

A denial of the right to use such methods would, therefore, amount to a denial of the taxability of life interests and annuities under the act. But the taxability of such interests has been so often upheld as not now to be open to question.

4. Fixing a given rate of interest as the earning power of money for purposes of tax assessment is not an unlawful attempt to exercise legislative power.

In order to assess the present value of a right to receive money in the future it is necessary to determine the interest which money will earn and to apply this as a rate of discount. Determining the earning power of money is, then, simply a step in the process of valuation.

Assessment of property for purposes of taxation can not ordinarily be undertaken by the legislature. It may be that in cases like this, in which all assessments are affected by the same factor—*e. g.*, the rate of discount—the legislature could conveniently prescribe a rule. But such actual power to act does not transform what is properly an administrative matter into an exclusively legislative function.

If Congress has outlined the purpose and scope of legislation, it can leave to administrative officials the

power to make regulations to carry it into effect. *United States* v. *Grimaud*, 220 U. S. 506; *United States* v. *Antikamnia Company*, 231 U. S. 654.

In the war revenue act Congress fixed the rates of taxation and left to the Commissioner of Internal Revenue the process of applying them. The most that can be said of this is that it is an example of the familiar right "to leave to executive officials the duty of bringing about the result pointed out by the statute." *Buttfield* v. *Stranahan*, 192 U. S. 470, 496.

5. Appellants in any event are entitled to recover only the difference between what they paid and what was due. Since there is no showing that the assessment was unreasonable or excessive, no recovery can be had.

The Court of Claims found that the assessment was made in accordance with the general rules promulgated by the Commissioner of Internal Revenue, but did not find that the assessment as made was unreasonable or excessive in any particular.

And in all the criticisms contained in appellants' brief there is no suggestion that the expectancy of life of the several beneficiaries was other than that shown by the tables, or that the earning power of the several funds was different from that prescribed in the general order.

All of said criticisms are based on purely supposititious case, as, for example, what would have been the result if the four beneficiaries involved in the case of *Vanderbilt* v. *Eidman*, 196 U. S. 480, had all died in the order of their succession within the period of one year? (Brief pp. 31–33.)

It is submitted that no recovery can be had in the present case, where there is no showing of excessive taxation or injustice, because the method employed might in certain extreme cases have worked a hardship. The most that appellants could have recovered in any event would be the difference between the amount paid and the amount due. *Crocker* v. *Malley*, 249 U. S. 223.

II.

There can be no recovery on the ground that the assets remaining in the hands of the executors on July 1, 1902, were not vested within the meaning of the act of June 27, 1902.

1. The funds were as fully vested in the hands of the executors, in trust for the legatee, as they would have been in the hands of the Trust Company.

On July 1, 1902, appellants still retained in their hands a large part of the residuary estate, consisting of $49,021 in cash, $548,948 cash on account with the firm of Moore & Schley, and $1,200,000 in securities. (Rec. 39.)

The argument that the interests in the funds in the hands of the executors on July 1, 1902, were not vested because creditors of the estate possessed the right to proceed against them is untenable.

If a legacy can not be regarded as vested so long as it is liable for the debts of creditors of the estate, then no legacy can ever be vested (in New York, at least) until every claim against the estate has been extinguished by the statute of limitations applicable to the particular claim.

So far as the liability of such legacies for the debts of the testator is concerned, it makes no difference whether they are retained in the hands of the executor or are paid over to the trustee or legatees. Section 2718 of the New York Civil Code, providing that claims against an estate must be filed within six months is merely for the protection of the executor or administrator, and does not bar the claim. Said section concludes as follows:

> * * * If a suit be brought on a claim which is not presented to the executor or administrator within six months from the first publication of such notice, the executor or administrator shall not be chargeable for any assets or moneys that he may have paid in satisfaction of any lawful claims, or of any legacies, or in making distribution to the next of kin before such suit was commenced.

And section 1837 of the code expressly provides for action against next of kin, legatees, etc., upon claims not presented to the executor or administrator with the six months' period:

> An action may be maintained, as prescribed in this article, against the surviving husband or wife of a decedent, and the next of kin of an intestate, or the next of kin or legatees of a testator, to recover, to the extent of the assets paid or distributed to them, for a debt of the decedent, upon which an action might have been maintained against the executor or administrator. The neglect of the creditor to present his claim to the executor or administrator, within the time prescribed by law for

> that purpose, does not impair his right to maintain such an action.

This section introduced no new principle into the law, but merely restated the law as it existed previously. *Read* v. *Patterson*, 134 N. Y., 128.

Not only may the creditors of a testator follow the funds of the estate into the hands of the executors, administrators, and legatees, but may also follow them into the hands of a trustee. Thus in the case of *City of New York* v. *United States Trust Co.*, 79 N. Y., Supp. 1010, 78 App. Div. 366, affirmed *per curiam*, 178 N. Y. 551, which involved a situation where, by agreement of the legatees, the legacies were placed in trust for their use for life, it was held that while a judgment creditor of the testator could not sue the legatees under section 1837 of the code, the fund not having been received by them, yet the fund could be impressed in the hands of the trustees, since such fund

> is, in equity, so far as creditors are concerned, still part of the estate of the testator, and it is readily identified and should be followed and impressed with the lien of the respondent's judgment to the extent necessary to satisfy the same.

It follows, therefore, that the funds were as fully vested in the hands of the executors as they would have been in the hands of the trust company. The executors having retained the assets for the purpose of investing and reinvesting them, were trustees for the performance of those duties to the same extent as

though declared so to be in the most explicit terms. *Ward* v. *Ward*, 105 N. Y. 68. The funds would have been liable to the debts of the testator wherever found, and the transfer from one trustee to another did not affect the vesting thereof.

2. The test is not whether a legacy was actually in the possession of the beneficiary on July 1, 1902, but whether the beneficiary on said date had a "present right" of possession.

On July 1, 1902, the estate had been under administration for more than three years. If, as is contended, the funds retained by them were held in their capacity as executors, the beneficiaries, on said date, could have maintained an action to compel the payment of said legacies. Section 1819 of the New York Code of Civil Procedure provides as follows:

> If, after the expiration of one year from the granting of letters testamentary or letters of administration, an executor or administrator refuses, upon demand, to pay a legacy or distributive share, the person entitled thereto may maintain such action against him as the case requires. (Rec. 18.)

The beneficiaries thus had a "present right" of possession. This rendered the funds taxable under the act of 1898, and no recovery can be had under the act of June 27, 1902. Thus in *Vanderbilt* v. *Eidman*, 196 U. S. 480, 495, the present Chief Justice after pointing out that the tax could not be imposed "in a case where the *right to possession or enjoyment* was subordinated to an uncertain contingency," said:

> And such is the construction which has been affixed to some State statutes, the text of which lent themselves more strongly to the construction that it was the intention to subject to immediate taxation merely technical interests, without regard to a *present right to possess or enjoy*. [Italics ours.]

And the court quoted from the decision in *Matter of Hoffman*, 143 N. Y. 327, as follows:

> For taxation is a hard fact, and should attach only to such ownership, and may properly be compelled to wait until chances and possibilities develop into the truth of an actual estate possessed, or *to which there exists an absolute right of future possession*. (196 U. S. 495, 496.) [Italics ours.]

Again, the court in *Hertz* v. *Woodman*, 218 U. S. 205, 219, said:

> The subject of the tax or duty exacted by section 29 is the right of succession which passes by death to a vested beneficial *right of possession or enjoyment* to a legacy or distributive share. [Italics ours.]

Speaking of the same statute in *United States* v. *Fidelity Trust Co.*, 222 U. S. 158, 160, the court said:

> It deals with the interest, that is, the *legal unit of right*, not with the money received before a given moment. [Italics ours.]

And finally, in *United States* v. *Jones*, 236, U. S. 106, 109, it was said:

> Interests which were contingent and uncertain were not affected, but only those whereof

> the beneficiary had become invested with a *present right of possession or enjoyment.* [Italics ours.]

The construction thus given to the act of 1898 is explanatory of the act of 1902, for the reason that the latter has been held to have constituted merely a legislative recognition of the construction given to the former. *Vanderbilt* v. *Eidman, supra.*

This, it is submitted, is the only reasonable interpretation the statute can receive. Otherwise, it would have been possible for beneficiaries having a "present right" of possession prior to July 1, 1902, by the simple expedient of leaving their legacies in the hands of the executors or administrators until after that date, to avoid paying the tax.

CONCLUSION.

It is submitted that the judgment of the Court of Claims was correct and should be affirmed.

ALEX. C. KING,
Solicitor General.
A. F. MYERS,
Attorney, Department of Justice.

MARCH, 1920.

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SIMPSON, SURVIVING EXECUTOR OF MOORE, *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 213. Argued March 17, 18, 1920.—Decided April 19, 1920.

In computing succession taxes payable under the War Revenue Act of 1898, upon legacies of the net income for life from funds placed with trustees for investment and reinvestment, it was lawful for the Commissioner of Internal Revenue to assess the legacies by means of general tables based on approved mortuary tables and on four per cent. as the assumed value of money. P. 550. 30 Stat. 448, §§ 29, 30; Rev. Stats., §§ 321, 3182.

The court takes judicial notice that, at the time when the taxes involved in this case were collected, four per cent. was very generally

assumed to be the fair value or earning power of money safely invested. P. 550.

Where a will directed conversion of residuary estate into money and its payment by the executors to a trustee of their selection, in trust for certain legatees, and where the trustee had been selected and the payments largely made, and there remained funds of the estate, clearly exceeding the requirements of pending claims, the payment of which to the trustee had become a duty of the executors enforceable by the legatees under the state law, *held*, that the interests of the legatees in such funds were vested, within the meaning of the Refunding Act of June 27, 1902, § 3, 32 Stat. 406. New York Code of Civil Procedure, 1899, §§ 2718, 2721 and 2722, considered. P. 551.

Proof that a suit by stockholders to obtain an accounting for promotion profits was pending against a firm of which a testator was a member, without showing the pleadings, the issues or character of the suit, the amount or merit of the claim, or the result of the litigation, *held*, insufficient to establish that legacies in funds in the hands of his executors were not vested, within the meaning of the Refunding Act of June 27, 1902, *supra*. P. 552.

53 Ct. Clms. 640, affirmed.

THE case is stated in the opinion.

Mr. Thomas M. Day, with whom *Mr. H. T. Newcomb* was on the brief, for appellant.

The Solicitor General, with whom *Mr. A. F. Myers* was on the brief, for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is a suit to recover the whole, or failing that, a large part of a succession tax assessed under the Spanish War Revenue Act of June 13, 1898, c. 448, 30 Stat. 448, and paid by the appellants as executors of the will of John G. Moore, deceased, a citizen of New York, who died in June, 1899.

The assessment was made against the appellants as persons having in charge or trust, as executors, legacies arising from personal property, and the contention is that right to recovery may be derived, either from the Act of Congress, approved July 27, 1912, c. 256, 37 Stat. 240, directing the Secretary of the Treasury to refund the amount of any claims which should be satisfactorily shown to have been "erroneously or illegally" assessed under warrant of § 29 of the War Revenue Act, or from the Act, approved June 27, 1902, c. 1160, 32 Stat. 406, which directs the Secretary of the Treasury to refund to executors so much of any tax as may have been collected under warrant of that act "on contingent beneficial interests which shall not have become vested prior to" July 1, 1902.

The decedent in his will directed his executors to convert a large residuary estate into money, to divide the same into three equal shares, and to transfer two of such shares to a trustee, to be selected by them, in trust to invest and reinvest and to pay to each of his two daughters the whole of the net income of one share so long as she should live.

Pursuant to authority derived from § 31 of the War Revenue Act and Rev. Stats., §§ 321 and 3182, the Commissioner of Internal Revenue, in order to provide for the determination of the amount of taxes to be assessed on legacies such as are here involved, on December 16, 1898, issued instructions to Collectors of Internal Revenue throughout the country, which contained tables showing the present worth of life interests in personal property, with directions for computing the tax upon the same. These tables were based on "Actuaries'" or "Combined Experience Tables," and were used in arriving at the amounts paid in this case.

On June 30, 1899, letters testamentary were issued to appellants as executors, and on April 1, 1901, the United States Commissioner of Internal Revenue, pursuant to the provisions of § 29 of the Spanish War Revenue Act, as-

sessed a tax of about $12,000 on the share of each daughter, which was paid on April 15, 1901.

On October 29, 1907, appellants presented to the Government their claim, which was rejected, for the refund of $21,640.55 of the taxes so paid, "or such greater amount thereof as the Commissioner might find to be refundable, under the Refunding Act of June 27, 1902, or other remedial statutes."

The judgment of the Court of Claims, dismissing the amended petition as to the claims for refund of the tax paid on the legacies of the two daughters, and on three small legacies which will follow the disposition of these, and need no further notice, is before us for review.

Of the two claims of error argued, the first is, that the Court of Claims erred in refusing to hold that it was illegal to use mortuary tables and to assume four per cent. as the value of money in computing the tax that was paid, and that, therefore, the whole amount of it should be refunded.

The objection is not to the particular table that was used but to the use of any such table at all—to the method. Such tables, indeed the precise table which was made the basis of the one used by the collector, had been resorted to for many years prior to 1899 by courts, legislatures and insurance companies for the purpose of determining the present value of future contingent interests in property, and we take judicial notice of the fact that at the time this tax was collected four per cent. was very generally assumed to be the fair value or earning power of money safely invested. Both the method and the rate adopted in this case have been assumed by this court, without discussion, as proper in computing the amount of taxes to be collected under this War Revenue Act in *Knowlton* v. *Moore*, 178 U. S. 41, 44; *United States* v. *Fidelity Trust Co.*, 222 U. S. 158; *Rand* v. *United States*, 249 U. S. 503, 506, and in *Henry* v. *United States*, 251 U. S. 393. It is much too late to successfully assail a method so generally ap-

plied, and as to this claim of error the judgment of the Court of Claims is affirmed.

The facts following are essential to the disposition of the remaining question. The appellant executors appointed a trust company trustee for the two daughters of decedent and prior to July 1, 1902, they paid to it, in trust for each of them the sum of $426,086.66. After making these payments the executors had in their custody in cash and securities in excess of $1,797,000, from which, prior to March 16, 1906, they made further payments, amounting approximately to $500,000 to the trust fund for each of the daughters, thereby making each of them exceed $926,000. The assessment of each was $665,000 in April, 1901.

The contention is that the excess of the assessment above the amount which had been actually paid to the trustee prior to July 1, 1902, had not become vested prior to that date, within the meaning of the Act of June 27, 1902 (32 Stat. 406, § 3), and that it should therefore be refunded.

The law of New York in force when the estate was in process of administration, provided (New York Code of Civil Procedure, 1899, § 2721) that "after the expiration of one year (from the time of granting letters testamentary) the executors . . . must discharge the specific legacies bequeathed by the will and pay general legacies, if there be assets," and § 2722 gave to legatees the right to petition in an appropriate court to compel payment of their legacies after the expiration of such year.

Letters testamentary were granted to the appellants on June 30, 1899, and we have seen that assets abundantly sufficient to have increased the trust fund legacies of the daughters much beyond the amount at which they were assessed for taxation were in the custody of the executors prior to July 1, 1902, and therefore under this law of New York it was their duty to have made such payments prior to that date unless cause was shown for not so doing.

The state law also authorized (§ 2718) the executors to publish a notice once in each week for six months, requiring all creditors to present their claims against the estate, and provided that in suits brought on any claim not presented within six months from the first publication of such notice, the executors should not be chargeable for any assets which they may have paid out in satisfaction of legacies.

The appellants first published the notice to creditors on April 25, 1900, and therefore they might safely have made payment on the daughters' legacies after the 1st of November, 1900, one year and eight months prior to July 1, 1902, unless cause to the contrary was shown.

The only excuse given in the record for not complying with this state law is that in March, 1902, a stockholders' suit was commenced against the partnership of Moore & Schley, of which the deceased was a member, in which an accounting was sought for a large amount of promotion profits in connection with the organization of the American Malt Company. As to this the Court of Claims finds that the evidence does not show the pleadings, issues or the character of the suit, or the amount or merit of the claim, or the result of the litigation. Obviously, such a showing of such a suit cannot be considered to have been a genuine obstacle to settlement of the estate, and the other claims against it were negligible in comparison with the available assets.

It is thus apparent that for many months prior to July 1, 1902, there were abundant assets with which to make payments upon these two legacies, in an amount larger than was necessary to make them equal to, and greater than, that for which they were assessed for taxation; that for many months before that date it was the legal duty of the executors to make such payment; and that for a like time the legatees had a statutory right to institute suit to compel payment.

It is obvious that legacies which it was thus the legal

duty of the executors to pay before July 1, 1902, and for compelling payment of which a statutory remedy was given to the legatees before that date, were vested in possession and enjoyment, within the meaning of the Act of June 27, 1902, as it was interpreted in *United States* v. *Fidelity Trust Co.*, 222 U. S. 158; *McCoach* v. *Pratt*, 236 U. S. 562, 567; and in *Henry* v. *United States*, 251 U. S. 393. The case would be one for an increased assessment, rather than for a refund, if the War Revenue Act had not been repealed.

Affirmed.

MR. JUSTICE MCREYNOLDS did not participate in the discussion or decision of this case.